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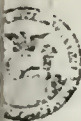
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George Agnost,
City Attorney

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May 20, 1980

OPINION NO. 80- 36

SUBJECT: The Grandfather Clause and the 40-Day Hearing
Rule in the Adult Bookstore Ordinance

REQUESTED BY: Richard Guggenhime, President
Board of Permit Appeals

PREPARED BY: Burk E. Delventhal
Deputy City Attorney
Elizabeth M. Katz
Legal Assistant

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QUESTIONS PRESENTED

1. Does Police Code Section 791.2, a "grandfather clause" provision of the Adult Bookstore Ordinance, unqualifiedly require the City to issue an adult bookstore permit to the operator of an adult bookstore which was functioning on the effective date of the ordinance?
2. If the operator of an adult bookstore which was functioning on the effective date of the ordinance files an application more than 60 days after the effective date of the ordinance, must the application be considered as an application for a new business?
3. Is the provision of Police Code Section 791.7, which requires the Chief of Police to hold a hearing within 40 days after the filing of an application, mandatory, and therefore does failure to hold the hearing within that time deprive the Chief of Police of jurisdiction to hold a hearing and thereafter to determine whether to issue the permit?

CONCLUSIONS

1. Police Code Section 791.2 requires the permit issuing authority to issue an adult bookstore permit to the operator of an adult bookstore which was functioning on the

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effective date of the ordinance only when the application is timely filed and proof of operation is established.

2. An application which is not timely filed must be considered as an application for a new business.

3. The 40-day rule is directory rather than mandatory, and failure to hold a hearing within 40 days does not deprive the Chief of Police of jurisdiction or relieve him of his duty to hold the hearing and determine whether the permit should be granted.

ANALYSIS Factual Background

The San Francisco Adult Bookstore Ordinance (Police Code Section 791 et seq.) was approved on January 5, 1979, and went into effect on February 4, 1979. Section 791.2 of that ordinance, a "grandfather clause", provides that any person operating an adult bookstore in the City on the effective date of the ordinance shall, upon application as provided in Section 791.5 and upon proof of operation, be issued a permit by the Chief of Police without necessity of public notice and hearing. "Grandfather clause" applications, pursuant to Section 791.5 of the Ordinance, must be filed within 60 days of the effective date of the ordinance. Section 791.7 of the ordinance provides that, for applications requiring public notice and hearing, the Chief of Police shall set a time and place for the hearing within 40 days from the date the application was filed. Section 791.8 specifies four other City departments which must inspect applicant's premises and make a written recommendation to the Chief of Police. And Section 791.9 requires that a permit be issued after investigation and public hearing if the application meets three conditions: (1) it complies with the Ordinance; (2) it complies with all other applicable laws; and (3) it is not knowingly "false, misleading or fraudulent". These criteria govern the Board's disposition of this appeal.

The Jaguar Adult Bookstore was in operation on the effective date of the ordinance, February 4, 1979. Its application for a permit was not filed until May 4, 1979, ninety days after the effective date of the ordinance. The Police Department treated the application as a new business application, requiring public notice and hearing. On May 7,

1979, the Chief of Police, pursuant to Section 791.8, referred the application to the Bureau of Building Inspection, the Fire Department, the Health Department and the City Planning Department for inspection of the premises and written recommendation concerning compliance with the codes each administers. In this case, Health Department clearance was obtained on May 9, 1979; Fire Department clearance on June 18, 1979; electrical inspection clearance on August 3, 1979; and Building Inspection clearance on January 16, 1980. Public hearing was held on February 12, 1980. Thereafter, the permit was denied, and timely appeal was made to the Board of Permit Appeals.

The Board has presented this office with three questions which involve two issues: (1) the meaning of the "grandfather clause" and (2) the meaning of the 40-day rule in the ordinance. We note that these issues and questions relate to the appeal now pending before the Board in the following way. In the event that the Board finds that the Jaguar application was filed more than 60 days after the effective date of the Adult Bookstore Ordinance, the Board (like the Chief of Police) may not grant the permit on the basis of the grandfather clause provisions of Section 791.2. The Board (like the Chief of Police) ¹ must review the application in a public hearing. Even though the public hearing was not set within 40 days of the application, the Chief of Police retained jurisdiction and had a duty to hold the hearing, to consider all evidence submitted at that hearing and to base his decision on that evidence. The appeal to this Board followed the Chief's disposition of that application.

The hearing before the Board is a de novo proceeding. The Board must independently hear the evidence, evaluate it

¹ The questions submitted by the Board of Permit Appeals refer repeatedly to actions taken by the Chief of Police. However, this opinion is directed at and discusses the powers of the Board of Permit Appeals. In view of the fact that the Board of Permit Appeals has the same powers as the Chief of Police, reference is made throughout this opinion to the "permit granting authority." The Chief of Police and the Board of Permit Appeals, on appeal, are both permit issuing authorities.

and reach its own conclusion in compliance with the guidelines set forth in Section 791.9.

The "Grandfather Clause"

Police Code Section 791.2 provides in relevant part:

The Chief of Police shall issue a permit to any person operating any adult theater or adult bookstore as defined herein in the City and County of San Francisco on the effective date of this article upon application by said persons as provided in Section 791.5 and upon the presentation of such evidence of operation on the effective date of this ordinance as required by said Chief of Police; provided, however, that no notice or hearing as required by Sections 791.7 and 791.9 shall be required for the initial issuance of said permits; provided further, however, that any permits issued pursuant to this exception shall be expressly subject to the requirements of this article.

And Police Code Section 791.5 provides:

All persons operating an adult theater or adult bookstore as defined herein on the effective date of this article must file an application for a permit within sixty (60) days of the effective date of this article; failure to do so shall make continued operation of said adult theater or adult bookstore a violation of Section 791.22 hereof.

It has been said that "grandfather clauses" in initial regulatory statutes "satisfy the dictates of fairness by affording sanction for enterprises theretofore established". Commonwealth Air Transport, Inc. v. Stuart (1946) 303 Ky. 69, 73; 190 S.W.2d 866. "Grandfather clauses" are based on the legislative presumption that those who have acceptably followed a newly regulated profession or trade for a period of years, or who are engaged therein on a certain date, have the qualifications which subsequent entrants to the field must demonstrate by examination. State ex rel. Meyer v. Knutson (1965) 178 Neb. 375, 382; 133 N.W.2d 577. Rich v. State Board of Optometry (1960) 242 Cal.App.2d 598, 603.

A legislature has the prerogative to provide in what manner and in what period of time the grandfather right may be exercised. Id. "Grandfather clauses" generally specify some proof to be submitted, and usually, once proof has been established, and other requirements of the statute in question have been met, the regulating authority has no discretion with respect to issuance. Thrasher v. Board of Governors (Okla. 1961) 359 P.2d 717, 720; Bloom v. Texas State Bd. of Exam. of Psychologists (Tex. 1973) 492 S.W.2d 460.

"It is observed that the tendency of the courts in construing grandfather provisions in regulatory statutes or ordinances is to favor a strict construction, since such provisions are considered as exceptions or special privileges." 4 A.L.R.2d 667, 670. Thus, ordinarily, if a "grandfather clause" specifies a time limit within which to file a claim for the privilege conferred, failure to file the claim within the time specified will be fatal, even though the claimant may have been otherwise qualified under the clause. A "grandfather clause" application which is not timely filed is generally treated in the same fashion as any new application. Battles v. Board of Registry in Dentistry (1888) 16 R.I. 372, 17 A. 131; Kerbs v. State Veterinary Board (1908) 154 Mich. 500, 118 N.W. 4; Meads v. Human (1921) 84 Okla. 82, 202 P. 797; State ex rel. Homan v. Board of Embalmers and Funeral Directors (1939) 135 Ohio S. 321, 21 N.E.2d 102; Lambert Transfer & Storage Co. v. Banner Transfer Co. (Ky. App. 1958) 315 S.W.2d 629; Cowart v. Kalif (Fla. App. 1960) 123 So.2d 468; Dalco General Agency v. Cotten (Tex. App. 1970) 457 S.W.2d 348; and Garono v. State Board of Landscape Architect Examiners (1973) 35 Ohio S.2d 44, 298 N.E.2d 565.

The "grandfather" provisions of the San Francisco ordinance imposing a new permit requirement on adult bookstore operators grants a special privilege to those operating adult bookstores on the effective date of the ordinance. Upon timely application and establishment of proof of operation, such operators are automatically granted permits without notice or hearing. Even though the claimant for "grandfather clause" benefits may be otherwise qualified, failure to make timely application is fatal to the claim and the application must be treated in the usual manner. The time limitation is an integral part of the operation of the law

and may not be disregarded or waived by the administrative authority. To grant such exceptions would be to extend the right indefinitely at the unlimited discretion of the administrator of the law.

Cowart v. Kalif, supra, at 471. Granting a certificate seven years after a "grandfather clause" deadline had passed was "arbitrary, capricious, and a bare usurpation of power [the regulatory agency] did not and could not possess." George v. Arizona Corporation Commission (1958) 83 Ariz. 387, 322 P.2d 369, 372.

Accordingly, you are advised that neither the Chief of Police nor the Board of Permit Appeals may issue a permit applied for under the "grandfather clause" unless application for the permit was filed within 60 days from the effective date of the ordinance. Since the ordinance went into effect on February 4, 1979, "grandfather clause" applications should have been received by April 4, 1979. Since the Jaguar Adult Bookstore application was filed on May 4, 1979, both the Chief of Police and the Board of Permit Appeals must treat such an application as a new business application. As a new application, it may be granted or denied in the sound discretion of the permit issuing authority.

The 40-day rule

Section 791.7 provides, in relevant part:

When an application is filed for a new permit under this article, the Chief of Police shall fix a time and place for a public hearing thereon within 40 days from the date of filing of said application. Not less than 10 days before the date of such hearing, the Chief of Police shall cause to be posted a notice of such hearing in a conspicuous place on the property in which or on which the proposed adult theater or adult bookstore is to be operated and the applicant shall maintain said notice as posted the required number of days. Such notice shall set forth the following:

.

The Chief of Police is also required to refer the application to certain other City departments. Section 791.8 provides:

The Chief of Police, upon receiving an application for a permit to operate an adult theater or adult bookstore, shall refer the application to the Bureau of Building Inspection, the Fire Department, the Health Department, and the City Planning Department, which departments shall inspect the premises proposed to be operated as an adult theater or adult bookstore and shall make written recommendations to the Chief of Police concerning compliance with the codes that they administer.

The Chief of Police is to issue a permit within 14 days following the hearing, but it is clear that the recommendations of other City departments must be available to him, if not before the hearing, then before the permit can be issued. Section 791.9 provides, in relevant part:

The Chief of Police shall issue a permit within 14 days following a hearing as provided in Section 791.7 herein, based upon his investigation and subsequent to the public hearing provided for above, if he finds:

(1) That the operation, as proposed by the applicant, if permitted, would comply with all applicable laws, including, but not limited to, the City's building, health, zoning and fire ordinances as set forth in Section 791.1 herein.

. . . .

The Police Permit Bureau has informed us that its usual procedure is to obtain all necessary recommendations before the hearing. This procedure guarantees applicants' due process right to be informed of the recommendations and to have the opportunity to rebut them if necessary before a decision on the merits of the application is taken.

Generally, statutory requirements concerning the time at or within which an act is to be done are directory rather than

mandatory or jurisdictional, unless a contrary intent is clearly expressed. Edwards v. Steele (1979) 25 Cal.3d 406, 410.

In Payne v. San Francisco (1853) 3 Cal. 122, the California Supreme Court explained, at 126:

It is admitted to be well settled as a general rule, that where a statute specifies the time within which a public officer is to perform an official act, regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed, or the language of the legislature shows, that the designation of the time was intended as a limitation of the power of the officer; thus, where an act requires a sheriff to file a certificate of sale within ten days, his omission or neglect to do so within the specified time does not affect the validity of the sale and where a statute requires an act to be done by an officer within a certain time for a public purpose, though he neglect his duty by allowing the precise time to go by, if he afterwards perform, the public shall not suffer by the delay. An election is not rendered void by reason of the inspectors failing to make the returns within a specified time, nor will an assessment be invalidated by the omission of the assessors to assess the tax within a particular time.

Unless the nature of the act to be performed, or the language of the legislature, shows that the time designation is intended as a limitation of power or authority, said limitation is not jurisdictional and failure to comply therewith will not cause a public agency or agent to lose authority to perform the act.

In Pulcifer v. County of Alameda (1946) 29 Cal.2d 258, the California Supreme Court added a third test to distinguish between directory and mandatory time specifications. At 262, the Court explained that the essential task was to determine legislative intent from: (1) the terms of the statute construed as a whole; (2) the nature and character of the act to be done; and (3) the consequences of doing or failing to do

the act at the required time. The test was whether the consequences would defeat or promote the purpose of the law. And in Garrison v. Rourke (1948) 32 Cal.2d 430, 435-436, the California Supreme Court proposed that a time limitation is directory "unless a consequence or penalty is provided for failure to do the act within the time commanded."

For the application of this well-settled rule of law and the tests developed thereunder in regard to various governmental activities, see the cases cited in McDonald's Systems of California, Inc. v. Board of Permit Appeals (1975) 44 Cal.App.3d 525, 544-545, fn. 15. Accord, Radovich v. Agricultural Labor Relations Board (1977) 72 Cal.App.3d 36, 47.

Applying the rule and the tests mentioned above to the matter at hand, we note first that the ordinance does not provide a penalty or consequence for failure to fix the time and place for a hearing within 40 days of the permit application filing. Next, we note, from the terms of the statute as a whole, that both the public hearing and the clearances from the Bureau of Building Inspection, the Fire Department, the Health Department and the City Planning Department are necessary before a permit may be issued.

Thus, timely holding of the required public hearing (supposedly, 40 days from the filing of the permit application) and issuance of a permit (supposedly, within 14 days from the hearing) depend on the prompt cooperation of no less than five municipal agencies, the Police Department being only one. At the same time, the public hearing requirement for new entrants into the adult bookstore trade (or those who fail to apply for "grandfather clause" benefits in a timely fashion) is the distinguishing feature of the ordinance, designed to promote the public welfare. It would be absurd to hold that the time specifications in the ordinance are mandatory, when the Police Department cannot even exercise complete control over the process necessary to issue a permit and when its failure to meet the deadlines would deny both the public and the applicant the hearing so essential to the public purpose of the ordinance. Finally, we note that the 40 day rule is intended to assure the applicant a reasonably timely hearing. To rule that the failure of public officials timely to hold this hearing strips them of their power to exercise discretion in the matter or deprives them of their power to issue a permit would invert the rationale of the law,

leading to an absurd result. Accordingly, the Chief's failure to hold a hearing within 40 days does not relieve him or the Board of Permit Appeals, on appeal, of the duty to conduct a hearing on an application or to exercise sound discretion in determining whether the application should be granted or denied.

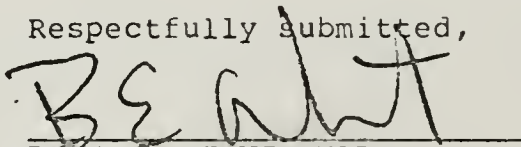
CONCLUSION

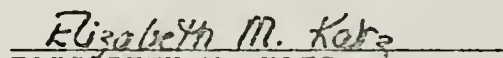
The Adult Bookstore Ordinance requires the permit issuing authority to issue a permit to the operator of an adult bookstore which was functioning on the effective date of the ordinance only when the application is timely filed and proof of operation is established. Since grandfather clauses provide exceptions to the law and confer special privileges, they are usually construed strictly by the courts. Even if an applicant is otherwise qualified, failure to apply for "grandfather clause" benefits within the time specified is fatal to the application, and it must be treated in the same fashion as a new application. If the time and place for a public hearing is not set within 40 days of such application, the permit issuing authority does not lose jurisdiction to hold such a hearing. To the contrary, the permit issuing authority has a duty to conduct a hearing, receive evidence and reach a decision on the application in accordance with the guidelines for issuing or denying a permit, as found in the enabling legislation.

If the Board finds that the Jaguar application was filed more than 60 days from the effective date of the ordinance, the Board (like the Chief of Police) may not grant the permit on the basis of the grandfather clause provisions of Section 791.2 and must treat the application as a new business application. In hearing the appeal from the decision of the Chief of Police, denying the application, the Board, guided by the criteria and conditions set down by Section 791.9 (compliance with the Adult Bookstore Ordinance, compliance with all other applicable laws, and truth in the application), may hear the same witnesses and may receive such further evidence as it deems necessary. The Board exercises its own discretion on the facts and, provided it adheres to the guidelines set forth in Section 791.9, is empowered to affirm

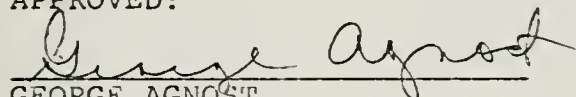
the Chief's decision or upon four votes to reverse the decision of the Chief of Police.

Respectfully submitted,


BURK E. DELVENTHAL
Deputy City Attorney


ELIZABETH M. KATZ
Legal Assistant

APPROVED:


GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

May 28, 1980

OPINION NO. 80-37

SUBJECT: Exemption from Taxation on Real Property
Owned by the People's Republic of China
for its Consular Office

REQUESTED BY: Helen Y. H. Hui
Attorney for the People's Republic of China

PREPARED BY: John H. Cummings
Deputy City Attorney

QUESTION PRESENTED

1. Is real property owned by the People's Republic of China for use as a consulate in San Francisco taxable or tax exempt?

CONCLUSION

1. If the property is owned by a foreign government and is used exclusively for consular purposes, it is exempt from ad valorem property tax.

ANALYSIS

The United States of America and the People's Republic of China are in the process of negotiating a Bilateral Consular Convention that will govern the consular activities between the two nations. This agreement is due to be signed in approximately six months.

In January, 1979 an Interim Agreement on Consular Relations was signed as an Executive agreement and currently controls all consular activity.

This Interim Agreement provides that the terms of the Vienna Convention of 1963 control until such time as the Bilateral agreement is signed and ratified.

Section 1 of Article 32 of the Vienna Convention provides that "Consular premises . . . of which the sending State . . . is the owner or lessee shall be exempt from all taxes."



OPINION NO. 80-37

Helen Y. H. Yui

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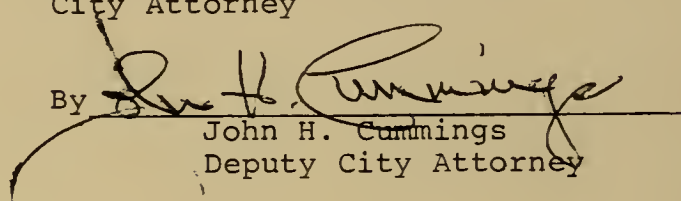
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The California Attorney General, in Attorney General Opinion No. 69-242, considered this question and decided that real property owned by a foreign government and used exclusively for consular purposes is exempt from ad valorem property tax. Republic of Argentina v. City of New York (1969) 250 N.E.2d 698.

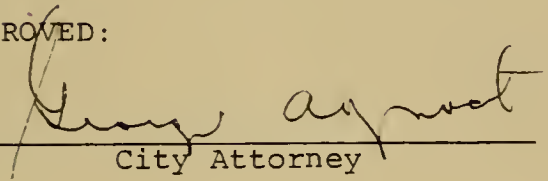
Very truly yours,

GEORGE AGNOST
City Attorney

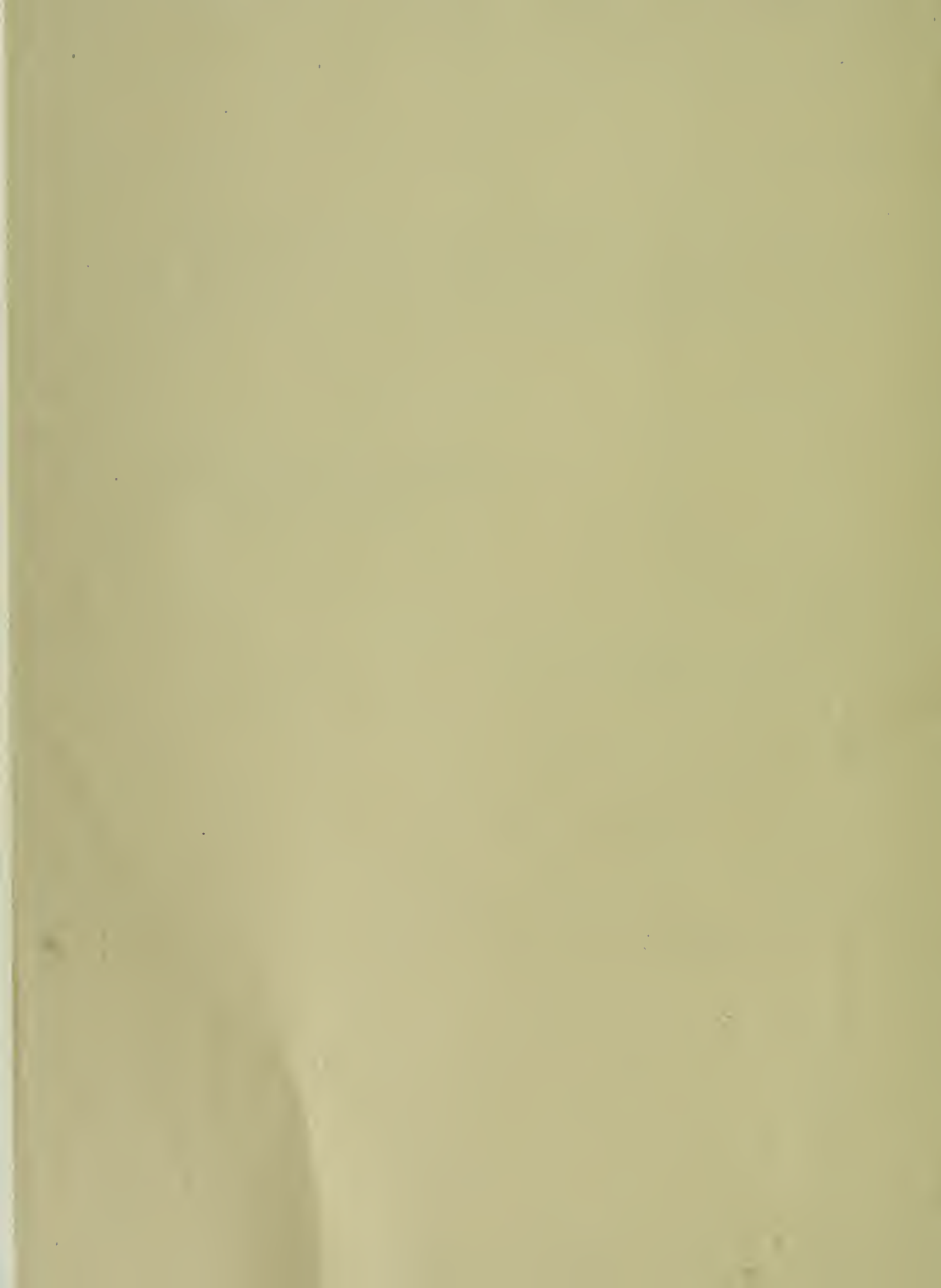
By


John H. Cummings
Deputy City Attorney

APPROVED:


City Attorney

JHC:dr



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GEORGE AGNOST
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OPINION NO. 80-38

May 30, 1980

SUBJECT: Jurisdiction of the Civil Service Commission to
Grant Back-Dated Seniority and Back Pay to an
Employee Who Claims that a Commission Error
Caused a Delayed Appointment to a Permanent
Position

REQUESTED BY: ALBERT C. WALKER, Assistant Secretary
Civil Service Commission

PREPARED BY: MICHAEL C. KILLELEA
Deputy City Attorney

QUESTION PRESENTED

Does the Civil Service Commission have jurisdiction to
grant back-dated seniority and back pay to an employee who
claims that a Commission error caused a delayed appointment to
a permanent position?

CONCLUSION

The Civil Service Commission has power to correct its
errors only until an eligible is appointed to a position.
Once the eligible is appointed, the Civil Service Commission
is without jurisdiction to grant back-dated seniority or back
pay for any purposes.

ANALYSIS

An H2 Firefighter (Mr. Jerome Pittman) has requested the
Civil Service Commission to award retroactive seniority due to
its failure to notify the employee of a right to take a
delayed physical performance test because of a physical
disability and also for its failure to give notice of the next
regularly scheduled physical performance test. The employee
has also requested back pay for the period during which he
claimed that his appointment was delayed due to these errors
of the civil service staff.

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The Civil Service Commission is the employment and personnel department of the city and county and shall determine appointments to the city service on the basis of merit and fitness as shown by appropriate tests (Section 3.661, Charter). The Commission administers competitive examinations in order to prepare lists of eligibles for appointment to the various departments of the city and county (Sections 8.321, 8.323, Charter). When a requisition is submitted to the Civil Service Commission, it shall certify to the department the three persons standing highest on the eligible list (Section 8.329, Charter). The department makes the selection and appointment of the eligible who then commences a probationary period as a permanent employee (Section 8.340, Charter).

The functions of the Civil Service Commission begin with the recruitment and examination of applicants and ends with the certification to a requisitioning department of eligibles off a civil service list for appointment. Once an eligible is appointed, the Civil Service Commission has no authority to interfere with the operation of a department and in particular, it has no jurisdiction over the seniority, assignment or discipline of the employees of another department. Further, after an appointment is made, the Civil Service Commission cannot change the appointment date.

The subject employee alleges that the Civil Service Commission erred in failing to notify him that he could have taken a delayed physical performance test due to his physical disability and further, that it did not notify him of the next regularly scheduled test. This, he claims, caused a delay on being placed on the eligible list and being appointed to the Fire Department. The subject employee had an opportunity to raise these issues during the examination period and any adverse decision on his request was appealable to the Civil Service Commission at that time (Section 5.06, Civil Service Rules). Instead, the employee waited until after he was appointed as an H2 Firefighter before proceeding with his request for retroactive seniority and back pay.

In my opinion, the Civil Service Commission has jurisdiction, if not otherwise restricted by the Charter or its own rules, to correct errors that occur during the examination process and while the eligible list is being

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established if the protest is timely raised under the Civil Service Rules. However, once a civil service eligible is appointed to a department, the Civil Service Commission has no jurisdiction to change the employee's date of permanent appointment to alter seniority within a department or to grant back pay. Since the subject employee did not pursue his claims before certification and appointment from the civil service eligible list, the Civil Service Commission has no jurisdiction to grant the requested relief.

Very truly yours,

GEORGE AGNOST
City Attorney

By: Michael C. Killelea
MICHAEL C. KILLELEA
Deputy City Attorney

APPROVED:

George Agnost
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

May 30, 1980

OPINION NO. 80-39

SUBJECT: Redevelopment Agency Bid Process
To Dispose Of Land Within Approved
Project Area

REQUESTED BY: Mr. Gilbert H. Boreman
Clerk of the Board
on behalf of
Supervisor John Bardis

DOCUMENTS DEPT.

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PREPARED BY: Robert A. Kenealey
Assistant Chief
Deputy City Attorney

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QUESTIONS PRESENTED

1. The legal validity of the Redevelopment Agency's bid process to undertake the execution of the Opera Plaza project.
2. Whether there were differences in the Agency's request for proposals from those finally contained in the Opera Plaza contract.
3. The appropriateness of the use of tax-exempt bonds to finance the construction of market rate housing.

CONCLUSIONS

1. The bid process of the Redevelopment Agency in undertaking the execution of the Opera Plaza project is legal.
2. There are no significant differences in the Agency's request for proposals from those finally contained in the Opera Plaza contract.
3. There was, and is, no violation of law with respect to the proposed use of SB 99 financing to the Opera Plaza project.

ANALYSIS

The Redevelopment Agency of San Francisco is a state agency functioning under state law to fulfill state purposes. (See Fellom v. Redevelopment Agency (1958) 157 Cal.App.2d 243; Andrews v. City of San Bernardino (1959) 175 Cal.App.2d 459.) After the adoption of a Redevelopment Plan by the Board of Supervisors and receipt of the plan by the Agency, the Agency is vested with responsibility for carrying out the plan (Section 33372, Health and

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Mr. Gilbert H. Boreman

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Safety Code.) The Agency is charged with the acquisition of and sale of all property within the Redevelopment Survey or Project Areas. (See Sections 33391, 33392, 33430, 33431 and 33432 of the Health and Safety Code.)

The agency may sell or lease its property without public bidding provided that, in such case, it does so after a public hearing which has been duly noticed by publication at least once a week for two (2) weeks in a newspaper of general circulation. (Health and Safety Code Section 33431)

The parcel referred to as 762-A is vacant land (except for temporary parking) lying between Golden Gate and Van Ness Avenues and Franklin and Turk Streets. This land lies within the Western Addition (A-2) Approved Redevelopment Project Area, and is thus within the Agency's vested responsibility for carrying out the Redevelopment Plan for that area.

In the spring of 1978, the Agency solicited proposals for development of Parcel 762-A. It did so by public advertisement in a variety of newspapers and approximately 2,000 mailings. This solicitation for proposals invited interested parties to pick up developer's packets which contained a variety of information and documents and, also, the submission requirements, the methods of evaluating proposals and the like.

When the Agency proceeds with the development of property in accordance with an approved redevelopment plan, historically the Agency has proceeded with request for proposals of the kind just outlined or with a direct negotiation with a single developer. When it proceeds with an offering in which proposals are requested, then, unless it rejects all proposals, it selects from those responding, a proposal which in its judgment best furthers the objectives and requirements of the applicable redevelopment plan. With respect to Parcel 762-A as noted, the plan is the Western Addition (A-2) Redevelopment Plan. The proposals solicited were for a fixed land price and for any uses permitted by the Redevelopment Plan.

Proposals were received in May of 1978. Several proposals were received from members of the Philippine community who had previously had some interest in the parcel through an abortive and by then terminated agreement for the development of the Philippine Cultural and Trade Center. Two (2) principal proposals were received; one from Opera Plaza and one from Pacific Trade Associates (PTA). Essentially, the competition was between the two principal

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proposals: PTA's being a proposal primarily for office buildings and Opera Plaza's being a proposal primarily for condominium housing. Both proposals contemplated some commercial and retail space as well as parking. Both proposals were for market rate development. Opera Plaza also solicited the possible use of SB 99 financing for its residential development. SB 99 is limited to residential development, as will be further discussed.

All proposals other than Opera Plaza's were then rejected and at a public meeting on October 31, 1978 so-called exclusive negotiating rights were granted to Opera Plaza. These exclusive negotiating rights were granted after provision was made for assistance to lenders and investors involved in the defunct Philippine Cultural and Trade Center project, and because the Commission wanted housing on Parcel 762-A and not office buildings.

Thereafter, over a period of several months, an agreement was negotiated between Opera Plaza and the Agency for the purchase and development of the parcel. After the basic terms of the agreement were negotiated, there was then published, in accordance with law, the required newspaper notice, and the required public hearing was then held by the Agency Commission on February 20, 1979 at which time, and following the hearing, the agreement with Opera Plaza was authorized. The agreement was thereafter executed by the Agency on February 23, 1979, said agreement having previously been executed by Opera Plaza. It should be noted that the basic schematic design is refined following the execution of the agreement in accordance with the agreement's terms. The Agency retains design approval.

Based upon the law and the facts it is my opinion that the procedures that the Agency followed were lawful and that, although, not legally required, the parameters of the agreement finally negotiated were within the parameters of the offer and of the proposals received in response to that offer.

In answer to the third question which relates to the appropriateness of the use of tax-exempt bonds to finance construction of the project, the answer is as follows.

SB 99 financing derives its name from the Senate bill which was subsequently codified in the Health and Safety Code at Section 33750 and those following. The purposes of SB 99, found in the preliminary Sections 33750 through 33752, are noteworthy. SB 99 financing is available to redevelopment agencies. Its object is to

OPINION NO. 80-39

Mr. Gilbert H. Boreman

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May 30, 1978

finance residential construction in redevelopment project areas to encourage investment and upgrade such areas and to provide a form of financing for residential construction, particularly in situations where owners and investors are not able to obtain loans from private sources. (Health and Safety Code Section 33750)

In addition, the residential construction financing available through SB 99 is expressly found by the legislature as having a purpose to "encourage Californians of all social and economic positions to reinhabit urban areas, thereby rendering these areas more socially balanced and economically self-sufficient." (Health and Safety Code Section 33751(b)).

The legislature further specifically finds that the construction of federally assisted housing for low and moderate income households is not a primary purpose of SB 99. (Health and Safety Code Section 33752) The validity of SB 99, including particularly the legality of financing market rate housing, was upheld by the State Court of Appeal in Redevelopment Agency of the City of San Pablo v. Sheppard (1977) 75 Cal.App.3d 453.

SB 99 specifically permits the use of tax exempt bonds to finance construction loans as well as permanent takeout financing. (Health and Safety Code Section 33760)

SB 99 does not impose any limitations on price, mix of units or income. The Opera Plaza development is within the ambit of both the legislative purpose and express provisions of SB 99. The Agency Commission determined that market rate housing is appropriate for that parcel. With financing becoming increasingly difficult in 1979, use of SB 99 was considered as a means of making the project feasible.

Based on Health and Safety Code Section 33750 and the sections following, as confirmed by the City of San Pablo case cited above, and on the determination of the Agency Commission that market rate housing was appropriate on Parcel 762-A as part of the implementation of the Western Addition A-2 Redevelopment Plan, it is appropriate to use tax-exempt bonds to "finance mortgages assumed by purchasers" of condominiums, which will provide market rate housing to some "upper income purchasers." Furthermore, since sales prices and unit mix is not a condition of SB 99 financing, changes in the sales prices and unit mix are not prohibited by SB 99.

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Mr. Gilbert H. Boreman

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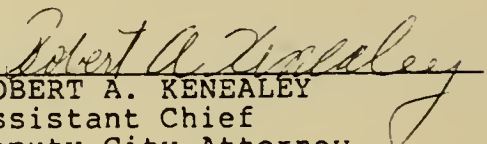
May 30, 1980

There was and is no violation of law with respect to the proposed use of SB 99 financing for the Opera Plaza project.

Respectfully submitted,

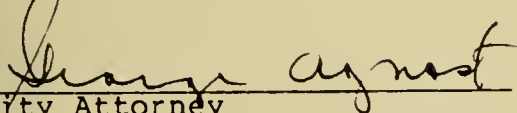
GEORGE AGNOST
City Attorney

By


ROBERT A. KENEALEY
Assistant Chief
Deputy City Attorney

RAK/jac

APPROVED:


City Attorney

George Agnost,
City Attorney

June 9, 1980

OPINION NO. 80-40

SUBJECT: Necessity to Meet and Confer on Mayor's Budget Allocations.

REQUESTED BY: Rudy Nothenberg,
Executive Deputy to the Mayor

DOCUMENTS DEPT.

PREPARED BY: James L. Lazarus
Deputy City Attorney

JUN 19 1980

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QUESTIONS PRESENTED

Must the Mayor's Office meet and confer with employee representatives on budget reductions which affect employee working conditions?

CONCLUSION

Yes.

ANALYSIS

This is to confirm oral advice given the Office of the Mayor regarding its meet and confer responsibilities pursuant to the Meyers-Miliias-Brown Act (Government Code Section 3500, et seq.).

Pursuant to Charter Section 6.203, the Mayor is empowered to transmit a consolidated budget to the Board of Supervisors not later than June 1 of each year. The Mayor generally, has only the power to reduce budget requests from the departments. Likewise, Charter Section 6.205 prohibits the Board of Supervisors, generally, from increasing the amounts contained in the Mayor's proposed budget. In other words, if a department requests an overtime account of \$500,000 and the Mayor reduces it to \$400,000 the Board has no authority to restore the amount cut by the Mayor.

Under Government Code Section 3504.5 the City is required to give reasonable, written notice to a recognized employee organization of any proposal for legislative action "directly related to matters within the scope of representation". The "scope of representation" is defined in Section 3504 to:

"...include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

Pursuant to Section 3505, the City must "meet and confer in good faith" with employee organization "...prior to arriving at a determination of policy or course of action.." on the matter.

Generally, this duty rests with the governing body of the jurisdiction. However, San Francisco's governmental system divides areas of control between the Board of Supervisors, the Mayor, and the various departments. Therefore, the intent of the Meyers-Miliias-Brown Act can only be achieved by requiring the branch of government with ultimate authority to meet and confer when they anticipate acting in a manner which will affect the wages, hours or other working conditions of a represented employee.

In 1976 the Board of Supervisors eliminated from the Log Cabin and Hidden Valley Ranch budget overtime monies for counselors. During the previous 30 years employees in those classifications worked a 48 hour work week which guaranteed eight hours of overtime compensation. The Board's action meant a reduction in the counselors hours of employment and gross salary. The Court of Appeals in Civil Service Association, Local 400 v. City and County of San Francisco (1979) 1/Civil 40755 held that:

"The elimination of the long-standing overtime practice, in the present case, was directly related to the counselor and senior counselors' "hours" of employment and, upon appellant's request for a conference on the matter, was clearly a mandatory negotiable subject under the statute. (Citations omitted)"

As a result, the City must meet and confer with recognized employee organization when budget reductions impact upon a pre-existing working condition. And because the Board of

Rudy Nothenberg

June 9, 1980

Supervisors is not empowered to propose budget, the duty to meet and confer rests with the Mayor when she proposes a reduction.

This duty only extends to reductions which will materially alter existing working conditions. For instance, account reductions which result in a topic for meeting and conferring. meet and confer on the impact of remaining employees' work load. reimbursement in a department which has been required to use their personal vehicles would require meeting and conferring.

CO

Because budgetary reductions by the Board of Supervisors, proposed in a material alteration to an employee's working condition must be brought to the attention of a representative and, upon demand, meet and confer prior to implementing said

reductions to items in the Mayor's budget. The duty to meet and confer rests with the Mayor.

Reductions by the Mayor of wages, hours of employment or benefits have held that salary reductions are not a required department head may have to meet and confer on the impact of staff reduction has on the employee. elimination of mileage reimbursement. Employees have traditionally been required to use their personal vehicles for official business and the Mayor.

Reductions which will result in a material alteration to an employee's working condition must be brought to the attention of a representative and, upon demand, meet and confer prior to implementing said

Respectfully submitted,

AGNOST
Attorney


E. LAZARUS
City Attorney

Approved:


City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

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CITY ATTORNEY
CITY HALL

OPINION NO. 80-41

June 10, 1980

SUBJECT: Disability Benefits for Fire Department Members
Injured While Temporarily Assigned to A Higher
Rank.

REQUESTED BY: ANDREW C. CASPER
Chief of Fire Department

PREPARED BY: MICHAEL C. KILLELEA
Deputy City Attorney

QUESTION PRESENTED:

Whether uniformed members of the Fire Department who are injured in the performance of their duties while temporarily assigned to a higher rank are entitled to disability pay equal to the salary of the higher rank even though such members had not been given a physical examination within six months prior to their temporary appointment or assignment as required by Section 8, subparagraph 4 of the Annual Salary Ordinances for 1977-78 and 1978-79.

CONCLUSION

Yes.

ANALYSIS

The Annual Salary Ordinance for 1977-78 and 1978-79 relating to salaries for uniformed members of the police and fire departments contained a requirement (Section 8) that disability benefits under Section 8.515 and 8.516 of the Charter to uniformed members shall be payable at the salary of the higher rank to which said member is temporarily assigned at the time of the disability provided that the member meets four conditions including having passed a physical examination within six months prior to the appointment or assignment. You have noted that the Fire Department has complied with the conditions of Section 8 in awarding disability benefits but that twenty-seven (27) members who were injured while temporarily assigned to a higher rank did not meet the requirement that a physical examination be administered prior to their assignment.

Andrew C. Casper

2

June 10, 1980

The question is now presented whether the requirements of Section 8 of the 1977-78 and 1978-79 Salary Ordinances can restrict disability benefits in view of Sections 8.515 and 8.516 of the Charter on the same subject which places no condition on entitlement to such benefits.

Section 8.515 of the Charter provides in pertinent part:

"Whenever any member of the fire or police department is incapacitated for the performance of his duties by reason of any bodily injury received in or illness caused by the performance of his duty, as determined by the retirement board, he shall become entitled, regardless of his period of service with the City and County, to disability benefits equal to and in lieu of his salary as fixed by the Charter, while so disabled, for a period or periods not exceeding twelve months in the aggregate, with respect to any one injury or illness."

Section 8.516 of the Charter provides essentially the same as quoted above. Section 8 of the subject Annual Salary Ordinances incorporates the rights provided for in both Section 8.515 and 8.516 of the Charter but adds four (4) conditions for receipt of disability benefits including a requirement that the uniformed member pass a medical examination within six months prior to the appointment or assignment.

It is a well-established principle of law that an ordinance cannot change or limit the provisions of the Charter; and where there is a conflict between the two, the Charter will control. (South Pasadena vs. Terminal Railway Co. 109 Cal 315; Simons vs. City of Los Angeles 72 C.A.3d 924; Lucchesi v. City of San Jose, 104 C.A.3d 323 (April 9, 1980); Brown v. City of Berkeley, 57 C.A.3d 223; McDonald's System of California, Inc. v. Board of Permit Appeals, 44 C.A.3d 525; Acton v. Henderson, 150 C.A.2d 1, Marculescu v. City Planning Comm., 7 C.A.2d 371.) Since the subject ordinance places a condition on eligibility for disability benefits which is not provided for in Sections 8.515 and 8.516 of the Charter, the ordinance is invalid insofar as it conflicts with the Charter.

Therefore the 27 uniformed members who did not receive a medical examination as provided for in Section 8, subparagraph 4 of the subject ordinance, are entitled to disability benefits

OPINION NO. 80-41

Andrew C. Casper

3

June 10, 1980

if they otherwise meet the requirements of the applicable Charter sections.

This office has recently issued a similar opinion to the Police Department, a copy of which is attached (see City Attorney Opinion No. 80-22, dated April 14, 1980).

Very truly yours,

GEORGE AGNOST
City Attorney

Michael C. Killelea
MICHAEL C. KILLELEA
Deputy City Attorney

APPROVED:

George Agnost

City Attorney

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JUN 3 1980

June 10, 1980 SAN FRANCISCO
PUBLIC LIBRARYOPINION NO. 80-42GEORGE AGNOST
CITY ATTORNEY
CITY HALL

SUBJECT: Tax Exemption on Property Leased by the Foreign
Consulate of France

REQUESTED BY: Honorable Sam Duca
Assessor

PREPARED BY: B. Timothy Murphy
Deputy City Attorney

QUESTION PRESENTED

Is property leased by a foreign consulate for its consular functions entitled to tax exemption?

CONCLUSION

No.

FACTS

The French Consulate General desires to lease office space for his consular office in a building being constructd at 530/540 Bush Street. Both France and the United States are signators to the Vienna Convention. Article 32 of said treaty provides in full as follows:

Exemption from taxation of consular premises

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

ANALYSIS

The question presented has previously been discussed by the California Attorney General (Opinion No. 69-242) and by this office (Opinion No. 77-14). It is clear that the second paragraph of Article 32 precludes exemption in this instance.

Honorable Sam Duca

2

June 10, 1980

The primary duty of paying taxes rests upon the person who holds legal title to the property. (Three G Distillery Corp. v. County of Los Angeles, 46 Cal.App. 2d 498). Thus, the taxes are payable by the person leasing the premises to the Consulate General and the exemption provided in the first paragraph of Article 32 is not applicable.

For your convenience and reference I am enclosing copies of the Attorney General opinion and the prior opinion of this office.

Very truly yours,

GEORGE AGNOST
City Attorney

B. Timothy Murphy
B. Timothy Murphy

APPROVED AS TO FORM

George Agnost
GEORGE AGNOST
City Attorney

7178b

George Agnost,
City Attorney

June 12, 1980

OPINION NO. 80-43

3
SUBJECT: Submission of Proposed New Charter

REQUESTED BY: Jay Patterson
Registrar of Voters

DOCUMENTS DEPT.

PREPARED BY: Burk E. Delventhal
Deputy City Attorney
Elizabeth M. Katz
Legal Assistant

JUN 19 1980

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QUESTIONS PRESENTED

When a proposed new charter is submitted to the voters, does any provision of state or local law:

1. Require the Controller to prepare a financial analysis of it?
2. Require that arguments for and against it be printed in the voters' pamphlet, or place a limit on the number of arguments which may be printed?
3. Require the Ballot Simplification Committee to prepare an analysis of it, or place a limit on the number of words the Committee may employ?
4. Provide specifications for printing it?
5. Require the Registrar to mail a printed copy of it to each voter?
6. Require the Registrar to set a deadline by which a final copy of the proposed new charter is delivered to him?

CONCLUSIONS

1. San Francisco Charter Section 9.112 requires the Controller to prepare a financial analysis of the proposed new charter.

2. San Francisco Administrative Code Sections 5.74-5.77-1 place no limit on the number of arguments for and against a proposed city charter which may be printed in the voters' pamphlet.

3. San Francisco Administrative Code Section 5.71 requires the Ballot Simplification Committee to prepare a digest of the proposed charter, and San Francisco Administrative Code Section 5.73 does not restrict the digest to 300 words in length.

4. Specifications for printing the proposed new charter are found in the California Government Code, Section 34456, and in the San Francisco Administrative Code Sections 5.78-5.80.

5. California Government Code Section 34456 requires the proposed new charter to be mailed to each qualified elector. San Francisco Charter Section 9.112 echoes this directive.

6. Charter Section 9.112 requires the Registrar to include the text of the proposed new charter in the voters pamphlet and to mail the pamphlet at least ten days prior to the election; this requirement necessitates the submission of a final copy of the proposed charter by a certain time.

ANALYSIS

Procedures for submission of a proposed new charter are set forth in the California Constitution, Article XI, Section 3, and in the California Government Code, Section 34450 et seq. Prior to 1970, procedures were elucidated entirely in the California Constitution, Article XI, Section 8. At that time, the Constitution was amended and Sections 34450 et seq. were added to the California Government Code. The change was made to streamline the Constitution and does not reflect any relinquishment of control by the state over these matters. Therefore, any City and County of San Francisco charter provisions or ordinances in conflict with State law are invalid. District Election Etc. Committee v. O'Connor (1978) 78 Cal.App.3d 261. Our answers to each of the questions you have presented follow this general rule of law.

Financial analysis

1. You have asked whether any provision of state or local law requires the Controller to prepare a financial analysis of the proposed charter. Government Code Section 34455 provides, in relevant part:

The charter commissioners shall propose a charter for the government of the city or city and county or revise a charter. The charter so prepared shall be signed by a majority of the charter commissioners and shall be filed in the office of the clerk of the governing body of the city or city and county. (Emphasis added.)

There is no provision in the Government Code for preparation of a financial analysis of the proposed charter. However, our Charter Section 9.112 provides, in relevant part:

Immediately after introduction in the board of supervisors, or filing with the clerk thereof, of any measure to be submitted to the voters, . . . the clerk of the board shall deliver a copy of such proposition to the controller. The controller shall thereon prepare and transmit to the board of supervisors an impartial financial analysis of the measure. . . . (Emphasis added.)

Since this provision of Charter Section 9.112 supplements, but does not conflict with, State law concerning city charters, we conclude that it is valid. Accordingly, you are advised that the Controller must prepare an impartial financial analysis of the proposed new charter.

Arguments

2. You have asked whether any provision of state or local law requires arguments for and against the proposed charter to be included in the voters' pamphlet and whether such law imposes a limit on the number of arguments to be printed. There is no provision in the Government Code for submission of arguments for and against a proposed city charter. Nevertheless, Government Code Section 34464(b) obviously contemplates such submission; that Section provides, in relevant part:

The third copy [of the complete text of a charter proposal] shall be submitted to the Secretary of State with the following: . . . (b) Certified copies of any arguments for or against the charter proposal . . . which were mailed to the voters pursuant to Section 5012 of the Elections Code. . . .

And Elections Code Section 5012 provides, in relevant part:

If there is no other method provided . . . in the case of a chartered city, by the charter or by city ordinance, arguments for and against any city measure may be submitted to the qualified voters of the city pursuant to this article. If a method is otherwise provided . . . in the case of a chartered city, by charter or city ordinance, for submitting arguments as to a particular kind of city measure, that method shall control.

The question thus becomes whether the City charter or a City ordinance provides a method for submitting arguments as to a proposed City charter, or whether State law shall control in this area.

The San Francisco Administrative Code, Chapter 5, Article VIII, Section 5.74, concerns arguments for and against "any measure to be voted on at any election in the City and County." However, Section 5.71 defines the term "measure" as used in this Article to

. . . mean and include any proposed charter amendment submitted to the voters by the Board of Supervisors, any proposition to incur a bonded indebtedness of the City and County submitted to the voters by the Board of Supervisors, any proposition submitted to the voters by the Board of Education of the San Francisco Unified School District or by the Governing Board of the San Francisco Community College District, any ordinance or declaration of policy submitted to the voters by either the Mayor, the Board of Supervisors or by one-third of said Board or any proposition submitted to the voters upon an initiative, referendum or recall petition.

A proposed charter is not expressly included in the above list, but this Section must be interpreted according to the following rule.

Use of the phrase 'shall mean and include' indicates that the statutory definition was not intended to be restrictive or exclusive. Athens Lodge No. 70 v. Wilson, 1953, 117 Cal.App.2d 322, 255 P.2d 482.

Ramirez & Feraud Chili Co. v. Las Palmas Food Company (D.C. Cal. 1956) 146 F.Supp. 594, 605. Therefore, the enumeration of particular kinds of city measures in Section 5.71 must not be deemed exclusive or restrictive, and the term "measure" as used in any Section of Chapter 5, Article VIII of this Code is not limited to the particular kinds of city measures so enumerated. We conclude that a proposed charter falls within the meaning of the phrase "any measure" as used in Section 5.74.

As mentioned above, Section 5.74 of that Article concerns submission of arguments for and against a city ballot measure. Section 5.75 concerns the length of and signature appended to arguments submitted; Section 5.76 requires that the Registrar review the arguments submitted for conformity with the provisions of Section 5.75. Section 5.77 provides for submission of arguments by the Mayor and the Board of Supervisors. And Section 5.77-1 states that:

In the event that an argument has been prepared and submitted in compliance with Sections 5.74, 5.75, 5.76 and 5.77, it shall be placed by the Registrar of Voters in the ballot pamphlet for which provision is made in Section 5.78 through 5.80.

Section 5.77-1 places no limit on the number of such arguments to be placed in the ballot pamphlet. You are advised that these procedures apply when the measure is a proposed city charter.

Simplification

3. You have asked whether any provision of state or local law requires the Ballot Simplification Committee to

prepare a digest of the proposed charter, and whether any provision of state or local law imposes a limit on the length of this digest. State law does not provide for digesting a proposed charter by a ballot simplification committee, nor is there any indication that such a digest is contemplated. Nonetheless, as long as local law does not conflict with state law on the subject, such local procedure is certainly allowed.

The San Francisco Administrative Code, Chapter 5, Article VIII, Section 5.70 provides for the establishment of a Ballot Simplification Committee. And Section 5.71 sets forth the powers and duties of the Committee. That Section provides, in relevant part:

The Committee shall have the power and duty to:
(a) Prepare a digest of any measure which is to be voted on at any election in the City and County. As used in this Article the term 'measure' shall mean and include any proposed charter amendment submitted to the voters by the Board of Supervisors, any proposition to incur a bonded indebtedness of the City and County submitted to the voters by the Board of Supervisors, any proposition submitted to the voters by the Board of Education of the San Francisco Unified School District or by the Governing Board of the San Francisco Community College District, any ordinance or declaration of policy submitted to the voters by either the Mayor, the Board of Supervisors or by one-third of said Board or any proposition submitted to the voters upon an initiative, referendum or recall petition.

We have already advised that the list above is not restrictive or exclusive. Therefore, the Ballot Simplification Committee has the power and duty to prepare a digest of the proposed city charter.

Section 5.73 provides, in relevant part:

. . . Each digest shall be limited to a maximum of 300 words exclusive of the title for each subsection provided for herein.

The question is whether the 300 word limit is mandatory or directory. As noted by the California Supreme Court in Morris v. County of Marin (1977) 18 Cal.3d 901 at 908:

. . . [T]he 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.

The test for determining whether the 300 word limit is mandatory or directory is well-stated by the California Supreme Court in Pulcifer v. County of Alameda (1946) 29 Cal.2d 258 at 262:

In order to determine whether a particular statutory provision . . . is mandatory or directory, the court . . . must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act [Citation omitted.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [Citation omitted], and the courts will look to see whether the provision is of the essence of the thing to be accomplished [Citation omitted].

Applying this test, we observe that the statutory provisions concerning the Ballot Simplification Committee emphasize the goal of understanding ballot measures, digesting them and communicating them to the public at an eighth grade reading level. Obviously, brevity is crucial to the public purpose of the law. More important, however, is the goal of understanding. Wherever strict adherence to the 300 word limit would subvert the goal of the law - as would likely be the case when the Committee must work with an entire charter - the limit cannot be mandatory. You are so advised.

Printing Specifications

4. You have asked whether any provision of state or local law sets forth specifications for printing the proposed charter. Government Code Section 34456 provides, in relevant part:

In any city and county with over 50,000 population, the governing body shall cause copies of the charter to be printed in convenient pamphlet form and in type of not less than 10-point

Because the population of the City and County of San Francisco exceeds 50,000, this Section applies here.

Further printing specifications, which supplement but do not conflict with State law, are found in Chapter 5, Article VIII of the San Francisco Administrative Code, Sections 5.78-5.80.

Mailing

5. You have asked whether a copy of the proposed Charter must be mailed to each voter or whether a copy may be mailed only to each household. Government Code Section 34456, quoted in part above, further provides that the governing body

shall cause copies to be mailed to each of the qualified electors of the city or city and county, and shall, until the date fixed for the election upon the charter, advertise in one or more newspapers of general circulation in said city or city and county a notice that copies may be had upon application therefor. (Emphasis added.)

Our Charter Section 9.112 echoes this directive:

Whenever any measure is required by this charter to be submitted to the voters of the city and county at any election, the registrar shall cause the measure or policy to be printed in pamphlet form and shall mail the same with a sample ballot to each voter, at least ten days prior to the election. (Emphasis added.)

You are therefore advised that a copy of the proposed Charter must be mailed to each voter.

Deadline for Delivery of Final Copy of Charter

6. You have asked whether you may specify a date by which you must receive a final copy of the proposed charter. Responsibility for publication of the proposed charter is divided between the board of supervisors and your office.

Government Code Section 34455 provides:

The charter commissioners shall propose a charter for the government of the city or city and county or revise a charter. The charter so prepared shall be signed by a majority of the charter commissioners and shall be filed in the office of the clerk of the governing body of the city or city and county. The governing body of the city or city and county shall, within 15 days after such filing, cause such charter to be published once in the official newspaper of said city or city and county and in each edition thereof, during the day of publication. In case there is no such official newspaper, the charter shall be published in a newspaper of general circulation within such city or city and county and in all the editions thereof issued during the day of publication. (Emphasis added.)

The board of supervisors is to cause the txt of the proposed charter to be published in a newspaper within 15 days after the charter is filed with the clerk of the board.

San Francisco is also governed by the provisions of Government Code Section 34456, quoted above at p. 8. The board of supervisors is also to cause the text of the proposed charter to be printed in pamphlet form and to cause a copy to be mailed to each qualified voter. However, Charter Section 9.112 places responsibility for this process on the Registrar and sets a deadline for mailing the pamphlet. Since the charter is not substantially in conflict with state laws, it controls.

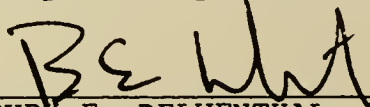
Finally, Government Code Section 34457 provides:

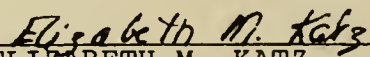
The proposed or revised charter shall be submitted to the electors of the city or city and county at a special election to be held on the next established election date not less than 74 days from the completion of the publication of the charter as provided in this article.
(Emphasis added.)

The next established election date is Tuesday, November 4, 1980. Therefore, the last day to mail the voters pamphlet is Saturday, October 25, 1980, the last day to publish the proposed charter in a newspaper is Friday, August 22, 1980, and the last day to file a copy of the proposed charter with the clerk of the board of supervisors is Thursday, August 7, 1980.

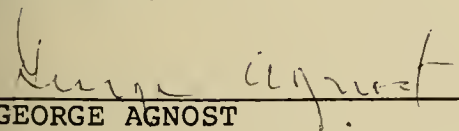
Publication of the final text of the proposed charter in a newspaper is the responsibility of the board of supervisors. Publication of the final text of the proposed charter in the voters pamphlet is the responsibility of the Registrar. Since the pamphlet must be mailed by October 25, 1980, you should request a copy of the final text of the proposed charter in time to meet this deadline.

Respectfully submitted,


BURK E. DELVENTHAL
Deputy City Attorney


ELIZABETH M. KATZ
Legal Assistant

APPROVED:


GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

June 10, 1980

DOCUMENTS DEPT.

JUN 13 1980

OPINION NO. 80-44

SAN FRANCISCO
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SUBJECT: Filing Fees On A Complaint Following Grant Of A
Late Claim Application

REQUESTED BY: Carl M. Olson
County Clerk

PREPARED BY: B. TIMOTHY MURPHY
Deputy City Attorney

QUESTION PRESENTED

Does filing of a complaint subsequent to an order granting late claim relief constitute a new action requiring a filing fee?

CONCLUSION

No.

ANALYSIS

Code of Civil Procedure Section 411.20 provides in pertinent part as follows:

Upon presentation of a complaint or other first paper and the payment of at least the fee prescribed . . . the clerk shall file it.

Government Code Section 946.6 is a remedial statute for those seeking relief for having failed to file a timely claim with a governmental entity. That section provides for the court to make an independent evaluation of the facts and circumstances causing the delay in filing a claim. If appropriate, the court may order relief for the petitioner who must then file suit within thirty (30) days of the order. The late claim statutes are silent as to whether or not a different or separate action must be filed.

It is clear from the cases that an order granting late claim relief is not appealable nor is it subject to review by

June 10, 1980

OPINION NO. 80-44

way of a writ of prohibition (Church v. County of Humboldt, 248 CA 2d. 855; County of Santa Clara v. Superior, 4 Cal. 3d. 545). Further, the appellate courts are reluctant to even review such orders on mandamus proceedings (Cf. San Francisco Superior Court File No. 757-826 wherein the court of appeals declined review on mandamus of an order granting late claim relief).

Thus, in order to provide and allow for subsequent review of an order granting late claim relief it would seem that the only appropriate procedure would be to file any such subsequently filed complaint in the same action using the same action number as exists for the petition for late claim relief. Accordingly, a new fee should not be charged as the petition for late claim relief constitutes "other first paper" as envisioned by Code of Civil Procedure Section 411.20.

Very truly yours,

B. Timothy Murphy

B. Timothy Murphy
Deputy City Attorney

APPROVED AS TO FORM:

George Agnost
GEORGE AGNOST
City Attorney

SF
C47
#3
80-45

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

June 26, 1980

OPINION 80 -45

SUBJECT: Environmental Impact Report Requirement
For Lake Lloyd Weather Modification

REQUESTED BY: Gerald K. Owyang
Office of Environmental Review
Department of City Planning

DOCUMENTS DEPT.

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

JUL 3 1980

Elizabeth M. Katz
Legal Assistant

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QUESTION PRESENTED

Is an environmental impact report required for a proposed cloud seeding program sponsored by Hetch Hetchy Water and Power in the Cherry Creek drainage basin of the Sierra Nevada (the Lake Lloyd watershed)?

CONCLUSION

No.

ANALYSIS

You have advised this office that Hetch Hetchy Water and Power, which is supervised and administered by the Public Utilities Commission of the City and County of San Francisco, wishes to sponsor a program to increase winter snowfall and spring runoff into Lake Lloyd by seeding winter storm clouds with silver iodide. And you ask whether an environmental impact report (hereinafter, EIR) must be prepared for this project.

In 1974, the state Attorney General delivered an opinion advising that the Santa Clara Valley Water District must prepare an EIR prior to engaging in cloud-seeding activities. See 57 Ops. Atty. Gen. 490 (Opinion No. SO 73-80; October 25, 1974). However, two significant changes in the law have subsequently occurred.

In 1978, the California Weather Resources Management Act added Chapter 4, Section 400 et. seq. to the California Water Code. Section 403 provides that the state Department of Water Resources

after public notice and hearing, shall adopt regulations necessary to carry out the purposes of this chapter. Such regulations shall include, but not be limited to, criteria and procedures for regulation of weather resources management activities in a manner which will augment, develop, conserve and protect the natural water resources of the state, protect the environment, and safeguard life and property.

Section 405 provides that: "No person shall engage in weather resources management within the state without a license." And Section 406 requires that any person "desiring to design or conduct weather resources management operations within the state" shall apply to the state Department of Water Resources for a license.

Chapter 4 of the Water Code, the enabling legislation, contains its own application procedures and guidelines for the issuance or denial of a license. And, pursuant to Section 403, the state Department of Water Resources has adopted regulations to carry out the purposes of this chapter. See for example 23 California Administrative Code Sections 493.01 - 493.02 and 494.05 - 494.09, concerning submission of a written document (including a description of the proposal, alternatives and mitigation measures) and its availability for review and comment.

Reference to Section 402 of the Water Code, "Definitions", clearly leads to the conclusion that the Weather Resources Management Act applies to the Hetch Hetchy Water and Power cloud-seeding project. Section 402(f) provides that, as used in Chapter 4,

"Person" means any individual, firm, association, organization, partnership, company, corporation, private or public, and any state, county, city, city and county, district, or other public agency.

Section 402(i) states:

"Weather resources management" means attempting to produce by physical means any of the following: cloud water conversion, light adjustment, or weather hazard suppression. Weather resources management does not include agricultural frost protection or inadvertent weather modification.

And Section 402(a) provides:

"Cloud water conversion" means the conversion of cloud material into precipitation in a manner different from that which would have occurred naturally.

While Section 402(j) states:

"Weather resources management project" or "project" means the performance of weather resources management with a specified purpose within a specified geographical area over a specified time interval.

Hetch Hetchy Water and Power is a public agency which proposes to convert cloud material into precipitation (snowfall) in an unnatural manner (seeding with silver iodide), a form of weather resources management which achieves the level of a project because it is to be performed with a specified purpose (increased snowfall and runoff) within a specified geographical area (the Lake Lloyd watershed) over a specified time interval (winter).

In 1970, the California Environmental Quality Act added Division 13, Section 21000 et. seq. to the California Public Resources Code. Section 21080.5, as amended in 1977 and 1978, provides in relevant part:

(a) When the regulatory program of a state agency, board, or commission requires a plan or other written documentation, containing environmental information and complying with the requirements of paragraph (3) of subdivision (d) of this section, to be submitted in support of any of the activities listed in subdivision (b), such plan or other written documentation may be

submitted in lieu of the environmental impact report required by this division; provided, that the Secretary of the Resources Agency has certified the regulatory program pursuant to this section.

(b) The provisions of this section shall apply only to regulatory programs or portions thereof which involve:

(1) The issuance to a person of a lease, permit, license, certificate, or other entitlement for use; or

(2) The adoption or approval of standards, rules, regulations or plans for use in the regulatory program.

. . .
(d) In order to qualify for certification pursuant to this section, a regulatory program shall require utilization of an interdisciplinary approach which will ensure the integrated use of the natural and social sciences in decision making and shall meet all of the following criteria;

(1) The enabling legislation of the regulatory program shall:

(i) Include protection of the environment among its principal purposes.

(ii) Contain authority for the administering agency to promulgate rules and regulations for the protection of the environment, guided by standards set forth in the enabling legislation.

(2) The rules and regulations adopted by the administering agency shall:

(i) Require that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment.

(ii) Include guidelines for the orderly evaluation of proposed activities and the preparation of the plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program.

(iii) Require the administering agency to consult with all public agencies which have jurisdiction, by law, with respect to the proposed activity.

(iv) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process.

(v) Require the filing of a notice of the decision by the administering agency on the proposed activity with the Secretary of the Resources Agency. Such notices shall be available for public inspection, and a list of such notices shall be posted on a weekly basis in the office of the Resources Agency. Each such list shall remain posted for a period of 30 days.

(vi) Require notice of the filing of the plan or other written documentation to be made to the public and to any person who requests, in writing, such notification. The notification shall be made in a manner that will provide the public or any such person with sufficient time to review and comment on such filing.

(3) The plan or other written documentation required by the regulatory program shall:

(i) Include a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse environmental impact.

(ii) Be available for a reasonable time for review and comment by other public agencies and the general public.

On March 3, 1980, the Secretary of the Resources Agency of California certified that the regulatory program of the state Department of Water Resources in regard to weather resources management operations complied with the requirements of Section 21080.5, thus exempting such proposed operations from the EIR requirement. In effect, this certification constitutes a determination not only that the permit procedure established by the California Weather Resources Management Act and amplified by the regulations of the California Department of Water Resources provides an alternative to the EIR procedure, but also that the alternative procedure is functionally equivalent to the EIR procedure.

The certification was made on March 3, 1980. Section 21080.5 subdivision (h) provides:

Any action or proceeding to attack, review,

June 26, 1980

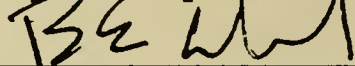
set aside, void or annul a determination of the Secretary of the Resources Agency to certify a regulatory program pursuant to this section on the basis that the regulatory program does not comply with the provisions of this section shall be commenced within 30 days after certification by the secretary.

Therefore, any action to challenge that certification must have been commenced by April 2, 1980. Since, to the best of our knowledge, no action was timely commenced to challenge the certification, it must be deemed conclusive. Accordingly, there is no need to discuss whether the regulatory program of the state Department of Water Resources in regard to weather resources management operations does indeed comply with the requirements of Public Resources Code Section 21080.5.

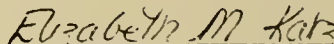
In view of the foregoing, you are advised that weather modification projects are exempted from environmental impact reporting requirements of the California Environmental Quality Act, Public Resources Code Section 21000 et. seq. Instead, the California Weather Resources Management Act, Water Code Section 400 et. seq., and California Department of Water Resources requirements, 23 California Administrative Code Section 490 et. seq., are applicable.

You are so advised.

Respectfully submitted,

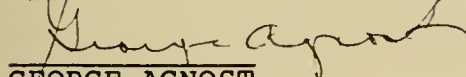


BURK E. DELVENTHAL
Deputy City Attorney



ELIZABETH M. KATZ
Legal Assistant

Approved:



GEORGE AGNOST
City Attorney

7133b

EK/DR/ay



George Agnost,
City Attorney

July 3, 1980

OPINION 80-46

SUBJECT: Effect of Concurrent Passage of Both Charter Amendments and New Charter

REQUESTED BY: JAY PATTERSON
Registrar of Voters

PREPARED BY: BURK E. DELVENTHAL
Deputy City Attorney
ELIZABETH M. KATZ
Legal Assistant

DOCUMENTS DEPT.

JUL 11 1980

SAN FRANCISCO
PUBLIC LIBRARYQUESTIONS PRESENTED

When a proposed charter revision is submitted to the voters at the election on November 4, 1980:

1. And an amendment to the existing charter is also submitted to the voters at that time, and both are approved, what effect does the charter amendment have?
2. And two or more amendments to the existing charter are submitted to the voters at the same time, and are of the same general purpose, and both are approved as well as the proposed charter revision, what effect do these charter amendments have?
3. And persons [other than a majority of the members of the charter commission] who do not favor some part or parts of the proposed charter revision wish to submit an alternative or alternatives to the voters at the same time, may alternatives be presented?
4. And an alternative version of some part of the proposed charter revision is submitted to the voters at the same time, and both pass, what effect does the alternative proposition have?
5. And two or more alternative versions of some part of the proposed charter are submitted to the voters at the same time, and both pass as well as the proposed charter revision, what effect do these alternative propositions have?

CONCLUSIONS

1. The amendment to the existing charter will only be effective until the new charter takes effect.

2. The amendment which has the higher or highest number of votes is the one which is incorporated into the existing charter to accomplish that purpose, but it will be effective only until the new charter takes effect.

3. Only the charter commission may submit an alternative proposal or alternative proposals to some part or parts of the proposed charter revision.

4. The alternative proposal takes the place of that part of the charter revision which it was intended to supplant.

5. The alternative which has the higher or highest number of votes is the one incorporated into the charter revision to accomplish that purpose.

ANALYSIS

You have advised this office that a proposed charter revision drawn up by a charter commission will be submitted to the voters at the election on Tuesday, November 4, 1980. You further advise us that amendments to the existing charter may be submitted to the voters at the same election and that alternatives to the proposed charter revision may be presented at the same time. You ask, assuming that the proposed charter revision passes, what the effect will be if the amendments to the existing charter are also approved by the voters and what the effect will be if alternatives to the proposed charter likewise pass. We first discuss some general principles governing charter procedures.

Charters may be proposed, revised, amended and repealed. Yet another procedure, not relevant to this opinion, is recodification of a charter. That procedure is not discussed here.

The California Constitution, Article XI, Section 3, subdivision (b) provides:

The governing body or charter commission of a county or city may prepare a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

These procedures are elucidated in the California Government Code, Section 34450 et seq. Prior to 1970, procedures were set forth entirely in the California Constitution, Article XI, Section 8. At that time, the Constitution was amended and Sections 34450 et seq. were added to the Government Code. The change was made to streamline the Constitution and does not reflect any relinquishment of control by the state over these matters. Therefore, any City and County of San Francisco charter provisions or ordinances in conflict with state law are invalid. District Election Etc. Committee v. O'Connor (1978) 78 Cal.App.3d 261.

Government Code Section 34451 provides, in relevant part:

The charter may be proposed or revised by a charter commission chosen by the electors of the city or city and county, ...

Government Code Sections 34451 through 34457 provide for the method of proposing or revising a charter by a charter commission.

Government Code Section 34458 provides, in relevant part:

As an alternative to the procedure provided for in Sections 34450 [sic] through 34457 of this article, the governing body of any city or city and county, on its own motion may propose or cause to be proposed or revise or cause to be revised, a charter

On the other hand, Government Code Section 34459 provides, in relevant part:

The charter of a city and county may be amended or repealed by proposals submitted by the governing body or by a petition signed by 10 percent of the qualified electors . . . or both. (Emphasis added.)

The procedure for amending or repealing a charter is spelled out in Government Code Sections 34459 through 34461. Government Code Section 34461 specifically states: "Amendments proposed by the governing body and amendments proposed by petition of the electors may be submitted at the same election."

A charter may be proposed or revised in one of two ways: by a charter commission (Government Code Section 34451) or by the governing body of a city or city and county (Government Code Section 34458). A charter may be amended or repealed in two ways: by the governing body on its own motion or by petition of the voters or both (Government Code Section 34459). The procedures for proposing or revising a charter are mutually exclusive alternatives; one procedure or the other must be followed at any one time. The procedures for amending or repealing a charter are not mutually exclusive alternatives; i.e., both methods may be used at any one time (Government Code Section 34461).

San Francisco has chosen the charter commission system to revise its charter at this time, and the content of the proposed charter, including any alternative schemes to be embodied in separate propositions, is therefore solely the commission's responsibility. That is, only the commission may submit proposed alternatives to the proposed charter. The board of supervisors may not do so, nor may the voters by petition.

An example of the proposal of a new city charter and, simultaneously, of an alternative to one aspect of that charter is found in Horn v. Allen (1924) 195 Cal. 121. A board of freeholders, elected for the purpose of framing a new city charter, duly submitted a charter comprising some 442 sections, of which section 6 provided that a city council be elected at large and section 20 provided that the city council consist of eleven members. Proposition 1 on the ballot posed the question: "Shall the proposed Charter of the City of Los Angeles be adopted?" The board of freeholders also submitted an alternative proposition (Number 2) which rewrote section 6 to provide that the city council be elected by districts and section 20 to provide that the city council consist of fifteen members. Proposition 2 read:

Shall the proposed alternative providing for a Council of fifteen members and for the

division of the city into fifteen districts, and for the election of one member of the Council from each of said districts, be adopted?

We will discuss below the effect when two such propositions are approved by the voters. At this point we simply emphasize that an alternative scheme or schemes to some part or parts may be proposed at the same time as a proposed new charter or charter revision, but that such proposal or proposals must be initiated by the same body as submits the proposed charter or charter revision. If San Francisco had chosen at this time to propose or revise its charter through the board of supervisors, only the board could submit alternatives. In no instance may an alternative or alternatives be initiated by petition of the electors, since they are excluded from directly framing a new charter or charter revision.

We now discuss the issue presented when both a proposed charter and a proposed alternative are approved by the voters, as occurred in the case of Horn v. Allen, supra.

In that case, when the returns were canvassed, the proposed charter received 126,058 favorable votes and 19,287 unfavorable votes. The alternative proposition received 88,275 favorable votes and 53,441 unfavorable votes. The city council, meeting as a canvassing board, declared that the charter was adopted while the alternative proposition was deemed to have failed. In a mandamus proceeding to compel the council to declare proposition 2 carried, the court granted the writ and held that the alternative had also been adopted and that the fifteen-member, district-elected, council plan was to be incorporated into the new charter in place of the scheme for an eleven-member council elected at large.

In reaching this decision, the Court considered the applicability of Article XI, Section 8 of the California Constitution as then enacted, which provided in relevant part:

In submitting any such charter or amendment separate propositions, whether alternative or conflicting, or one included within the other, may be submitted at the same time to be voted on by the electors separately, and, as between those so related, if more than one receive a

majority of the votes, the proposition receiving the larger number of votes shall control as to all matters in conflict.

The Court discussed the purpose and the desired result of this provision at 126:

Undoubtedly one of the purposes of this constitutional provision was to enable the board of freeholders to submit separately to the electors of the city for their approval or rejection questions of municipal concern of a controversial nature and in such a way as to permit the free expression of the preferences of the voters as between opposing views on such questions. It must also have been contemplated that such questions be so submitted as to permit the expression of that preference to be properly ascertained on the part of the canvassing board in order that the prevailing proposition be correctly certified and declared.

And at 127-128, the court explained why this provision did not apply to the problem before it:

The submission of a charter is one thing and the submission of separate propositions is quite another. There may be a submission of a charter without the submission of any separate proposition. The submission of separate propositions by the board of freeholders is optional. (See Apple v. Zemansky, 166 Cal. 83 [134 Pac. 1149].) There may not, however, be the submission of any separate proposition without the submission of the charter. It is only in connection with the submission of the charter that any separate proposition may be submitted (sic). If the charter be ratified and a separate proposition or propositions be defeated, the charter would go into effect upon its approval by the legislature and the submission of the separate proposition would have no effect upon it. If a case be assumed where the charter be defeated and a separate proposition submitted in connection therewith

receive a majority of all the votes cast thereon, then the separate proposition nominally would carry, but legally it could not go into effect because there would be no charter upon which it could operate. Again, if a charter be submitted and more than one separate proposition be also submitted, either as alternatives or conflicting or one included within the other, and more than one, as between those so related, receive a majority of the votes, the one receiving the larger number of votes would control as to all matters in conflict. The control which it would exercise would be effective as to matters in conflict or related subjects. This would certainly be true of its effectiveness as against any other separate proposition so related and submitted with it and to give it the force contemplated by the constitution would cause it to supersede any conflicting provision in the charter itself. But it would not supersede the entire charter. The contention of the respondents is based on the assumption that propositions Nos. 1 and 2 are alternative propositions as contemplated by the constitution, for it is only in the consideration of them in that sense that the clause "the proposition receiving the larger number of votes shall control" has any application. But the "proposition" referred to in that clause is one of two or more separate propositions submitted with the charter which as between such separate propositions, is found to prevail. If respondents' contention be correct it would seem also to be true that if proposition No. 2 received a larger number of votes than the charter, the latter would be defeated, notwithstanding the latter might receive a majority of all the votes cast thereon. But this would not be true for the reason that the charter would be ratified if it received a majority of all the votes cast thereon regardless of the number of votes cast on any separate proposition.

The Court, at 130, explained the choice before the voter:

If he were in favor of the charter and the at-large plan of councilmanic representation he would vote "yes" on proposition No. 1 and "no" on proposition No. 2. If he were in favor of the charter and in favor of the district plan he would vote "yes" on both propositions. If he were not in favor of either the charter as a whole or of the district plan he would vote "no" on both propositions. It would be unreasonable to assume that a voter would vote "no" on proposition No. 1 and "yes" on proposition No. 2, for he would be charged with knowledge that if the charter failed of ratification, proposition No. 2 could not become effective, even though the latter received a majority of votes cast thereon. In that case there would be no sections 6 and 20 which proposition No. 2 could displace for the very obvious reason that there would be no charter at all as proposed.

The Horn v. Allen decision may be summarized very simply: when two proposals of equal dignity and of the same general purpose are approved by the voters, the one with the higher number of votes prevails. Thus if two entire schemes of government were submitted to the voters at the same time and both received a majority of the votes, the one with the larger number of favorable votes would become the new charter. A proposed charter must pass for any proposed alternative to it to take effect, as a proposed alternative to some part of the proposed charter is dependent on the charter as a whole; it cannot stand alone. If the proposed charter does not pass and the proposed alternative does pass, the latter has no legal effect because there is no charter upon which it can operate. If the proposed charter passes and the proposed alternative passes - whether by a higher or lower number of favorable votes than favorable votes for the proposed charter - it takes effect and supersedes only those sections of the proposed charter for which it was intended to be a substitute. If the proposed charter passes and two (or more) alternatives to some part of the proposed charter also receive a majority of the votes, the alternatives are of equal dignity and the one with the higher number of favorable votes

is the one which is substituted in the new charter. Let us say, for example, that in the Horn v. Allan situation, the board of freeholders submitted yet another possible version of sections 6 and 20 in which half of the city council would be elected at large, half would be elected by districts and the total council membership were doubled; that alternative scheme would have been Proposition 3. Had Proposition 3 also received a majority of the vote and more than 88,275 votes (the favorable vote for Proposition 2) that version of sections 6 and 20 would have been incorporated into the new charter.

If a proposed charter, as affected by any approved alternative(s), passes, it supersedes the existing charter, as affected by any approved amendment(s). The proposal of a charter and alternatives is a completely separate sphere from that of an existing charter and amendments to it.

As originally adopted in 1897, Article XI, Section 8 of the California Constitution provided in relevant part:

Such proposed charter . . . shall become the charter. . . of such city and county, and shall become the organic law thereof, and supersede any existing charter and all amendments thereof, and all special laws inconsistent with such charter.

The reason for this consequence was well stated by the California Supreme Court in Ex Parte Sparks (1898) 120 Cal. 395, 398:

[The passage of a proposed charter] is not the passage of an ordinary law, but the establishment of a government. The new is to take the place of the old, however dissimilar, and although some parts of the old charter have no corresponding provisions in the new, there is no presumption that anything is continued, for the new scheme is deemed complete in itself and to provide all that is desired.

Thus in the above case, the Court held that the Sacramento charter of 1894 effectively established a police court presided over by a justice of the peace as a court of record,

replacing the police court presided over by a police judge, not a court of record, which had been established by an 1878 charter amendment.

Article XI, Section 5 of the California Constitution now provides, in relevant part:

City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

Although the current language of the Constitution no longer specifically states that a new charter supersedes all amendments to the existing charter, there is no indication that amendments to the existing charter are meant to survive. We conclude that even today a new charter supersedes amendments to the existing charter for two further reasons. First, it is still true that a new charter "is deemed complete in itself and to provide all that is desired." Ex Parte Sparks, supra, at 398. Second, a charter amendment is not an independent legal entity which can survive the existing charter to which it is attached. See Horn v. Allen, supra.

Accordingly, you are advised that whenever amendments to the existing charter are passed at the same time as a proposed charter revision is passed, the amendments are superseded when the new charter goes into effect. Amendments to an existing charter are not incorporated into the new charter.

That a charter amendment to the existing charter may receive more votes than the proposed charter revision has no effect upon this conclusion. San Francisco Charter Section 9.114 does not address this situation. That section provides, in relevant part:

When two or more proposed measures are of the same general purpose, the registrar shall so declare, and shall cause ballots to be so printed that the voter, first, may choose between any measure or none, and, secondly, may express his preference for any one. If a majority of the votes on the first question is affirmative, then the measure receiving the highest number of votes shall become law and the other fail of passage. In case two or

more measures are tied for the highest vote, they shall be resubmitted at the next ensuing general election. If there is a conflict between two or more measures or between two or more charter amendments adopted at the same election, then the measure or charter amendment receiving the highest affirmative vote shall prevail. (Emphasis added.)

Section 9.114 applies only when two or more proposed measures are of the same general purpose. However, a proposed amendment to the current charter and a proposed charter revision are not measures of the same general purpose. The California Supreme Court in Livermore v. Waite (1894) 102 Cal. 113 defined "amendment" as follows, at 118-119:

. . . [T]he term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. (Emphasis added.)

Since a proposed charter revision implies supplanting the lines of the original instrument, framing a whole new instrument, it is obvious that a proposed amendment to the current charter and a proposed charter revision are no more of the same general purpose than putting new parts in an old car and purchasing a new car.

CONCLUSION

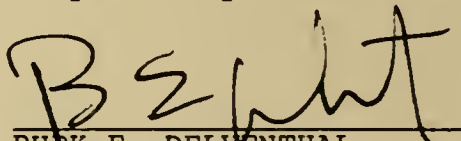
The law contemplates the separation of the process of proposing a new or revised charter from the process of amending an existing charter. In the former process, the voters are prohibited from directly framing the scheme of government through the initiative process. Such a task may be accomplished only by a charter commission or by the board of supervisors. Only one body or the other may embark upon this task at any given time. Therefore, only the body which has been designated to propose the new or revised charter may also present an alternative or alternatives to it. The proposed charter must pass before any alternative or alternatives receiving a favorable majority vote can have legal effect. If there are two or more alternatives of the same purpose which pass, the one receiving the higher or highest number of favorable votes is the one incorporated into the new charter

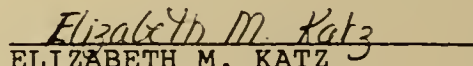
July 3, 1980

to achieve that purpose. The new charter, as affected by any approved alternative(s), supersedes the existing charter, as affected by any approved amendment(s). Of course, once the new charter goes into effect, it becomes the existing charter and may be amended accordingly.

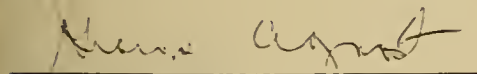
The proposal of an amendment of an existing charter may be accomplished by the board of supervisors on its own motion or by initiative of the voters. Both types of proposals may be submitted at any one election. An amendment which receives a majority favorable vote is incorporated into the existing charter either to replace an existing provision or to add to existing provisions. If two or more amendments of the same general purpose pass, the one receiving the higher or highest number of favorable votes is the one incorporated into the existing charter to achieve that purpose. You are so advised.

Respectfully submitted,


BURK E. DELVENTHAL
Deputy City Attorney


ELIZABETH M. KATZ
Legal Assistant

Approved:


GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

AUG 8 1980

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

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July 23, 1980

OPINION NO. 80-47

SUBJECT: Calculation of Vacation for Firefighters

REQUESTED BY: Raymond G. Connors, Jr., Secretary
Fire Commission of the City and County
of San Francisco

PREPARED BY: Stephanie M. Chang
Deputy City Attorney

QUESTION PRESENTED

Whether uniformed members of the Bureau of Fire Prevention with fifteen years of continuous service are entitled to an annual vacation of 20 work days or 16 work days.

ANSWER

Said persons are entitled to 16 work days of vacation.

ANALYSIS

Your letter states that uniformed personnel of the Fire Prevention Bureau, with the approval of the Fire Commission, are assigned on a modified tour system consisting of four ten-hour work days per week. Prior to implementing the modified tour system, said employees were assigned on a system of five eight-hour work days per week. Under the prior system, said employees who had 15 years of continuous service were allowed 20 eight-hour work days of vacation annually for a total of 160 hours of annual vacation.

You have raised the issue of whether vacation schedules for uniformed personnel of the Fire Prevention Bureau with 15 years of continuous service should receive, under the

Raymond G. Connors, Jr. 2

July 23, 1980

modified tour system, a total of 20 ten-hour work days (20 days x 10 hours = 200 hours) of annual vacation, or 16 ten-hour work days (16 days x 10 hours = 160 hours) of annual vacation.

Section 8.440 of the San Francisco Charter states in relevant part:

"(a) Every person employed in the city and county service shall be allowed a vacation with pay annually, as long as he continues in his employment as follows:

. . . .

"(3) After fifteen years' continuous service, twenty working days.

. . . .

"(c) In computing vacation pay, no employee shall be considered to work more than five days each week. Vacation pay for employees working less than a five day week shall be computed proportionately.

. . . .

"(h) . . . no section of the charter . . . shall be construed in any manner or for any purpose to increase, reduce or otherwise affect the time or duration of, or pay for, vacations provided by this section nor shall any employee be deemed to have any vacation rights other than or in excess of the vacation rights specified in this section."

Under the modified tour system, uniformed personnel of the Fire Prevention Bureau work less than a five day week. Hence, under Section 8.440(c) of the San Francisco Charter, supra, their vacation benefits must be computed proportionately as follows:

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Four-fifths of a five day week times 20 days
or 16 work days vacation.

This calculation results in the same total number of 160 vacation hours allowed under the previous system, and further complies with the mandate of Section 8.440(h) of the San Francisco Charter, supra, that no charter section be construed in such a manner as to result in an alteration in the time, duration or pay for any employee.

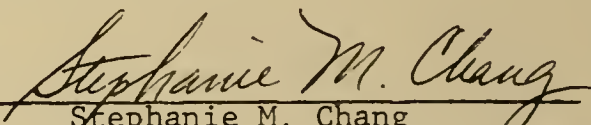
An interpretation that uniformed members of the Fire Prevention Bureau under the modified tour system with 15 years of continuous service should be allowed an annual vacation of 20 ten-hour work days (20 days x 10 hours = 200 hours) would result in an increase in the employees' vacation benefits. Said employee would thereby receive 40 additional hours of vacation annually merely because of the four day ten-hour work week schedule. Such an interpretation would violate the mandate of Section 8.440(h), supra, and would further ignore the proportionate calculation required under Section 8.440(c), supra.

You are so advised.

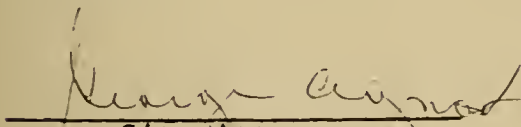
Very truly yours,

GEORGE AGNOST
City Attorney

By


Stephanie M. Chang
Deputy City Attorney

Approved:


City Attorney

SMC:alb



George Agnost,
City Attorney

July 23, 1980

OPINION NO. 80-48

DOCUMENTS DEPT.

SUBJECT: Authority of Board of Supervisors
to Approve Contract Waiving Sewer
Service Charge to the Port of San
Francisco

AUG 8 1980

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REQUESTED BY: JEFFREY LEE
Director
Department of Public Works

PREPARED BY: ROBERT A. KENEALEY
Assistant Chief
Deputy City Attorney

QUESTION PRESENTED

Is the Port of San Francisco obligated to pay appropriate
sewer service charges under the authority of the Public Works
Code and the Port Agreement?

CONCLUSION

Yes.

ANALYSIS

On July 23, 1976 an agreement was executed between the
Department of Public Works and the San Francisco Port Commis-
sion approved by resolution of the Board of Supervisors, which
granted permission to the Department of Public Works to construct
three (3) large sewer systems within areas under the Port's
jurisdiction. The agreement provides that in consideration for
granting this permission the Port would be relieved of paying
sewer service charges and sewer connection inspection charges.
The agreement further provides, however, that tenants who make
substantial use of sewer facilities will pay for water use and
for applicable sewer service charges. Other provisions of the
agreement are really not applicable here.

The Public Works Code defines those entities obligated to
pay sewer service charges as including governmental or public
institutions. Section 140 of the Public Works Code, Definitions,
provides in part as follows:

Mr. Jeffrey Lee

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"(d)" 'Sewage'. The spent water of the community received by the sewerage system. From the stand-point of source, it may be from storm water, well water, bay or ocean water, the liquid and water-carried wastes from residences, commercial buildings, industrial plants and governmental and non-governmental institutions.

"

"(i) 'User'. An owner or occupant, whether private, governmental or otherwise, of a unit, building, premises or lot in the City who is responsible for payment of Water Department metered charges or who contributes to the sewerage system from sources other than those of the Water Department."

Section 146 of the Public Works Code, entitled Billing and Collection, provides as follows:

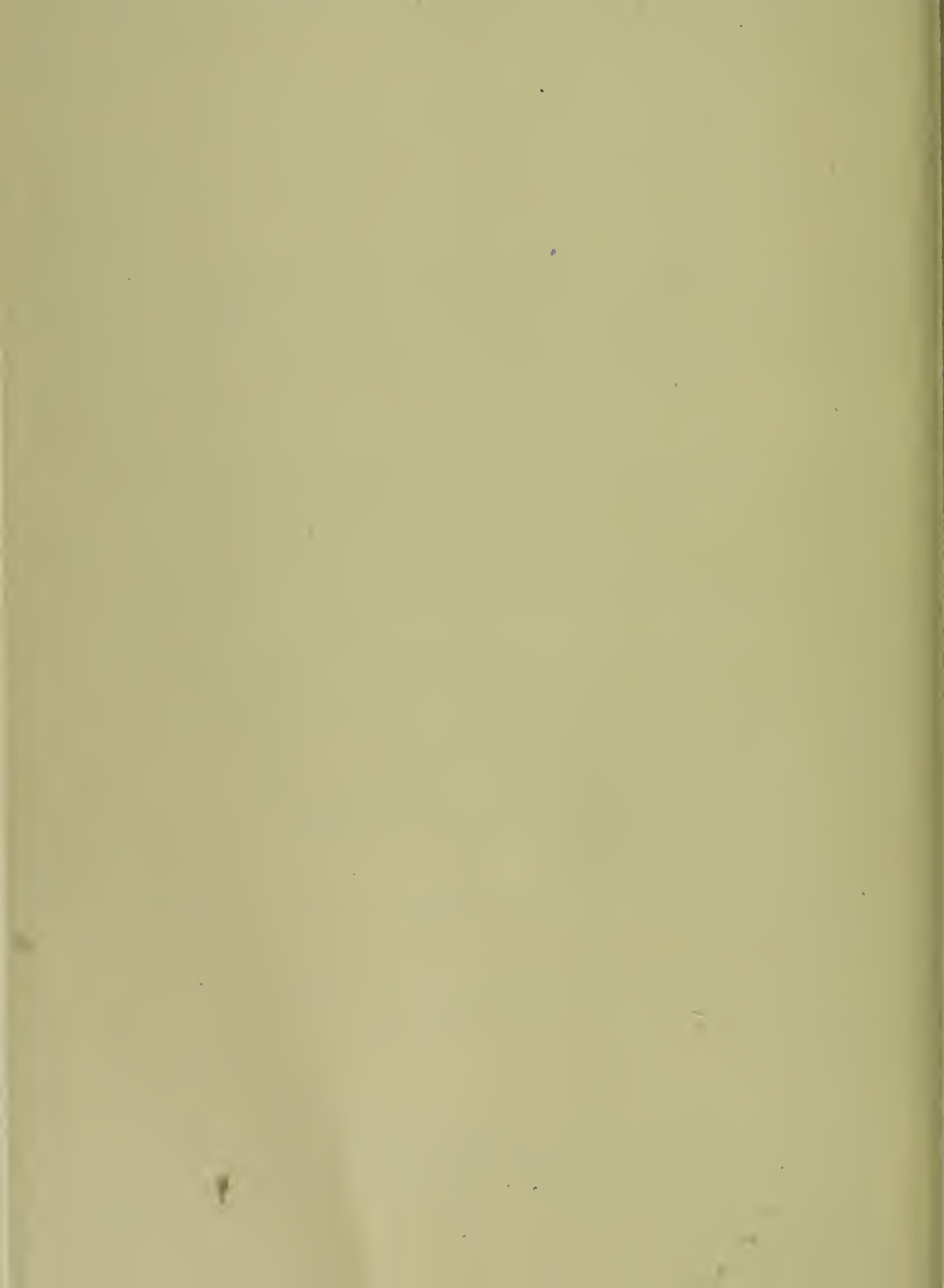
"The sewer service charge and industrial cost recovery charge imposed by this Article shall be collected from the user by the Water Department as provided by Sections 150.1 through 150.13 inclusive of this Article. Adopted schedules of charges shall be transmitted to the Water Department and billing and collection in accordance with the schedules shall commence on the next practicable billing cycle of the Water Department. The amounts collected shall be transmitted as soon as practical to the Treasurer for deposit to the credit of the funds established herein."

Section 150.1 of the Public Works Code, Definitions, relating to the collection of sewer service charges, provides in part as follows:

"(d) The term 'real property' means a lot or building thereon or other facility whether private, governmental or otherwise in the City and County of San Francisco;

"

"(h) The term 'sewer service' means service rendered to real property and paid for by the Sewer Service Charge and Industrial Cost Recovery Charge as established in Chapter X, Part II, San Francisco Municipal Code (Public Works Code) Sections 140 through 150 inclusive;"



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Section 145 of the Public Works Code lists several criteria which would allow the user an exemption. The only one which has any relevance is Section 145(3) which provides for an exemption if the water source does not discharge water into the San Francisco Sewage System. This section clearly relates to the Port Agreement in paragraph 1(A), which is quoted in part as follows:

"A. Sewer Service Charges. Sewer service charges will not be applicable to Port for water taken on by vessels and meter areas that do not have corollary discharges into the City sewage system, . . . "

The sections quoted above are from Ordinance No. 198-77 which was enacted after the date of the Agreement between the Department of Public Works and the San Francisco Port Commission. However, it should be noted that the provisions were taken verbatim from the original enactment of the sewer service charge ordinance which was adopted October 13, 1972, preceding the date of the Agreement between the Department of Public Works and the San Francisco Port Commission.

The general rule of law is that the sovereign is exempt from its own ordinances unless the ordinance is made specifically applicable thereto. (C. J. Kubach Company v. McGuire (1926) 199 Cal. 215, 248 P. 676.) In this case, it was the clear intention of the Board of Supervisors when it adopted the Sewer Service Charge Ordinance to define user as including a governmental unit. As a matter of fact, the City and County of San Francisco has imposed a sewer service charge on the State of California and the United States of America for buildings under their jurisdiction which discharge to the City sewage system.

The law is quite clear in that a municipality may not contract away its legislative and governmental functions. See McNeil v. The City of South Pasadena (1913) 166 Cal. 153, 155-156. It is also a general rule of law that where a contract has been executed in violation of a charter provision or municipal ordinance, as here, the city will not be liable in quasi contract and it will not be estopped to deny the validity of a contract. See Dynamic Industrial Company v. City of Long Beach (1958) 159 C.A.2d 818.



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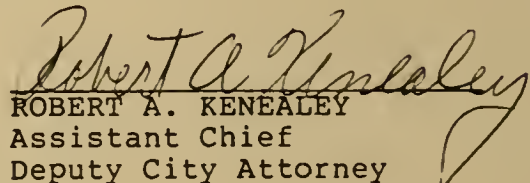
As mentioned above, the Agreement between the Department of Public Works and the San Francisco Port Commission was approved by resolution adopted by the Board of Supervisors. However, again it is quite clear that an ordinance adopted by the Board of Supervisors cannot be amended by a resolution of the Board. The method prescribed for amending ordinances must be specifically followed or an amendment will be void and of no effect. See California-Oregon Power Company v. Medford, 226 Fed. 957 (1915). An ordinance, once adopted by the Board of Supervisors, cannot be amended, repealed or suspended by resolution or other act of the Board of Supervisors of less dignity than the ordinance itself. See Consumers Power Company v. Krause, 89 Fed.2d 565 (1937). If the Board desired to grant a specific exemption to the Port of San Francisco, it would have to do so by specifically amending the sewer service charge ordinance in order to grant an exception to the Port of San Francisco from paying the sewer service charge.

For the reasons expressed above it is the opinion of this office that the Port of San Francisco is obligated to pay sewer service charges for premises directly operated by the Port.

Respectfully submitted,

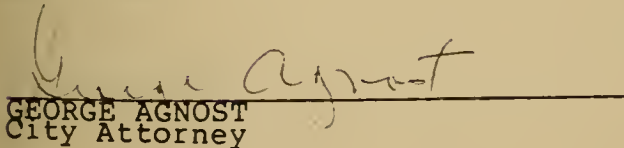
GEORGE AGNOST
City Attorney

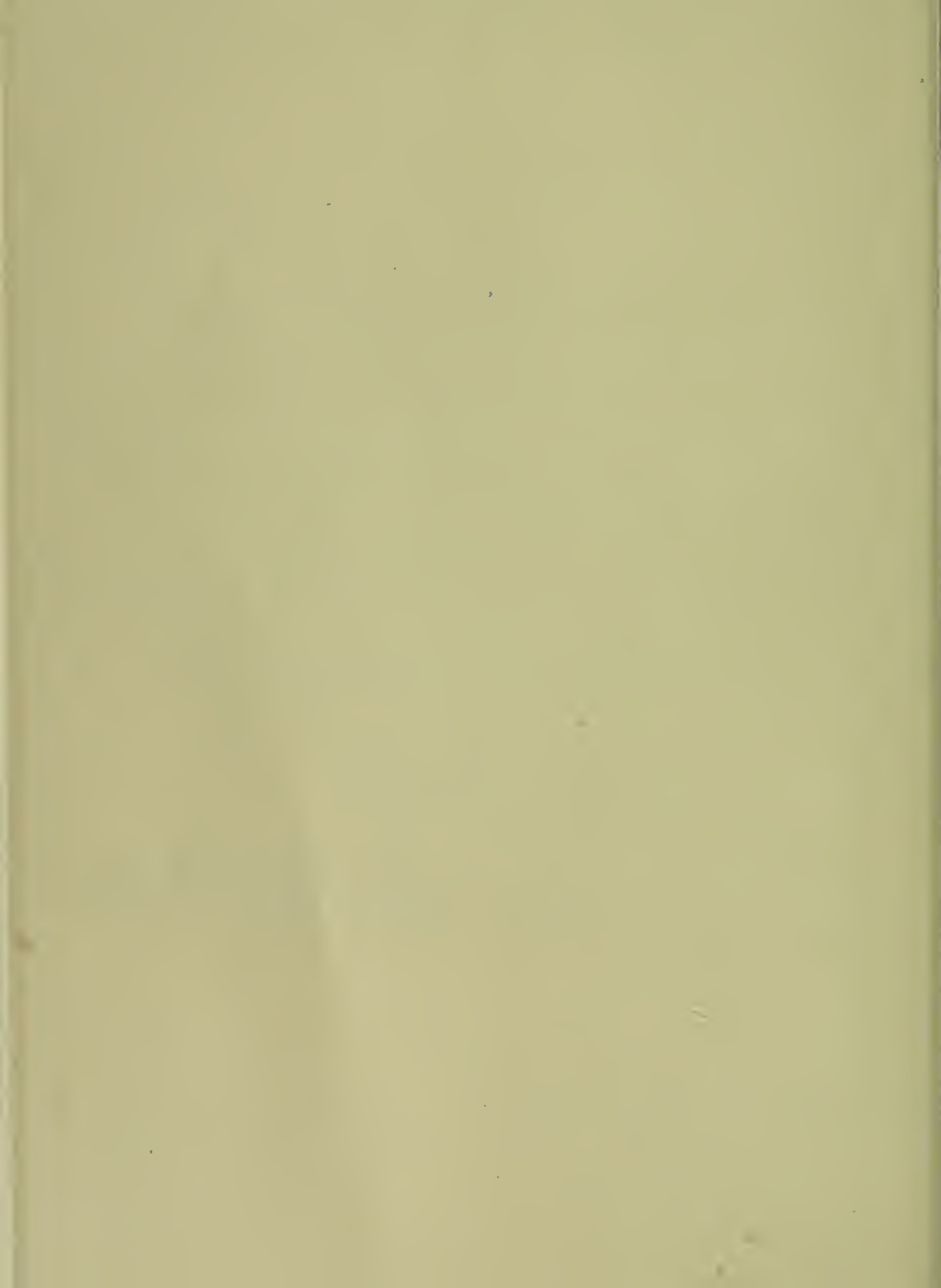
By


ROBERT A. KENEALEY
Assistant Chief
Deputy City Attorney

RAK/jac

APPROVED:


GEORGE AGNOST
City Attorney





George Agnost,
City Attorney

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APRIL 20, 1983

TO: ALL HOLDERS OF THE CITY ATTORNEY OPINIONS AND INDEXES
FROM: PEGGY ZEMENS, LIBRARIAN
RE: 1980 CITY ATTORNEY OPINIONS ERRATA

Opinion No. 80-49, page 2, line 16,

"City Attorney Opinions No. 803-A" should read:

"City Attorney Opinions No. 803-A (Dated March 16, 1954)"

Thank you for including this information with
your 1980 City Attorney Opinions.





George Agnost,
City Attorney

DOCUMENTS DEPT.

August 5, 1980

AUG 8 1980

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OPINION NO. 80-49

SUBJECT: Propriety of Competitive Bid Procedure Utilized by
Recreation and Park Department for Concession Lease

REQUESTED BY: Savas Araboglou, Business Manager
Recreation and Park Department

PREPARED BY: Paula Jesson
Deputy City Attorney

QUESTIONS PRESENTED

1. Is a bid procedure valid if it requires bidders to submit both a percentage of gross revenue and a minimum annual rental sum without specifying which figure will determine the highest bidder?

2. Is a concession lease properly awarded when the documents pertaining to the bid specify binocular equipment and the concession lease is awarded to a bidder who proposes a combination of binocular and monocular equipment?

3. May the Recreation and Park Commission reserve the right to negotiate terms and conditions with the highest responsible bidder?

CONCLUSIONS

1. No.

2. No.

3. Although reservation of the right to negotiate with the highest responsible bidder may, under certain limited circumstances, be proper, an unreserved right to negotiate nullifies the purpose underlying the competitive bid procedure.

ANALYSIS

You have asked whether a bid procedure was properly conducted by the Recreation and Park Department for a concession lease governing the installation and maintenance of coin-operated

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viewing equipment at Coit Tower and Marina Small Craft Harbor.

You have provided this office with copies of letters from a representative of Tower Optical Company, Inc., the losing bidder, which protests the procedure for various reasons. At least one of those reasons is based on a view of the facts which, according to my conversations with you regarding this matter, is disputed. Since two of the other reasons relied on by Tower are valid objections to the bid procedure, this opinion will discuss only those two since they do not require the resolution of a factual dispute.

Before examining the bid procedure, it should be noted that the Recreation and Park Commission has no legal obligation to engage in competitive bidding for the type of concession lease at issue. See City Attorney Opinions No. 803-A and No. 79-55. However, San Francisco Administrative Code Section 2.6-1 provides as follows:

Whenever in accordance with the provisions of the charter, any officer, board or commission of the city and county submits a proposed lease or agreement for concession privileges to be operated in or upon any property or facility of the city and county to the board of supervisors for its approval or disapproval, it shall be the policy of said board to approve only such proposals as have been awarded to the highest responsible bidder in accordance with competitive bidding procedures except where said board finds that such procedures were impractical or impossible.

Therefore, while the Recreation and Park Commission is not legally required to employ competitive bid procedures, it is, as a practical matter, obligated to do so since Charter Section 7.403 provides that the lease of land by the Recreation and Park Commission is "subject to approval of the Board of Supervisors by ordinance," and since the policy of the Board is to approve such lease agreements only if they are the result of competitive bidding, absent a finding by the Board that competitive bidding is "impractical or impossible."

Factual Background

The documents pertinent to the bid procedure in issue (the "Invitation for Bids", "Instructions to Bidders", "Bid Form" and "Proposed Lease Agreement for Coin-Operated Binocular Viewing Machine at Coit Tower and Marina Small Craft Harbor") were

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apparently available for distribution in early November, 1979 (the date is not clear from the material provided), presumably after appropriate public notice (Tower does not protest, nor do you request an opinion regarding, the Department's notice procedure). Bids were accepted from November 25, 1979 until December 18, 1979.

The "Bid Form" required bidders to provide four figures: (1) the percentage of the amount of coins from the machines which the bidder proposed to pay to the Department; (2) a minimum annual rental in dollars (the form states that "the proposed minimum annual rental will be applied against the sum of the percentage amounts" described in (1)); (3) and estimates of the amount of coins to be abstracted from the machines for the first year and the average year.

Tower objects to this format, stating in its letter of protest that "[w]ith two items to be filled in the bid was defective because it would be impossible to determine the highest unless bids were identical on one item, and one bid was higher on the other item."

The "Invitation for Bids" and all other forms pertinent to the bid procedure described above consistently describe the machines as "Coin-Operated Binocular Viewing Machines."

Two bids were received, one from Tower and one from Bear Optical Company. Bear submitted a bid of 50% of coins received or \$3,000 minimum, and Tower submitted an original and revised bids, the revised bid being 40% and \$8,000 minimum. Tower estimated a gross of \$22,000 and Bear of \$20,000, although Bear said this figure was a mistake based on confusion over the charge for each use of the machine. The information provided does not indicate whether the estimates of gross were for the first or the average year.

After the bids were opened, negotiations were entered into with both bidders and the outcome of these negotiations was that Bear and Tower both proposed 50% of gross or \$11,000 minimum. Staff recommended to the Commission that Bear be awarded the concession, at least in part because of the superiority of Bear's equipment, including the monocular machines. The Commission approved the award of the concession lease to Bear.

Tower has objected to the award of the concession lease to Bear on the grounds that Bear "did not offer to furnish 'Binocular' machines as required, but instead offered a

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combination of Binocular and Telescopic machines."

The Board of Supervisors has not yet approved the concession lease.

Validity of Format Which Calls for
Percentage Figure and Minimum Dollar Figure

The purpose of requiring competitive bid procedures for the concession lease under discussion is to secure the best service to the public and the highest revenue to the City through full competition. In order to secure the highest revenue to the City, the bid procedure must provide a common standard by which to determine which bidder has, in fact, submitted the highest bid.

The use of two figures to be submitted by bidders - one for a percentage of the coins received and one for a minimum dollar figure - was improper because it failed to provide this common standard.

In James Petrozello Co., Inc. v. Chatham TP. (1962) 75 N.J. Super. 173, 182 A.2d 572, the court held improper a bid procedure because it failed to provide a basis for "uniform comparison of bids." Id. at 575. In Petrozello, a township called for bids on a five-year garbage collection contract. Bidders were required to project the number and types of residences which might be erected within the next five years and to provide a unit bid per month charge for various categories of these structures. Although township officials had access to the information necessary to calculate future development, they did not make this calculation until after the bids were open. Since the information could be interpreted in different ways, either "optimistically" for a high rate of growth or "pessimistically" for a low rate of growth, the bid format enabled officials to favor one bidder over the other by juggling these calculations. The court concluded that "by failing to indicate estimates before bids were received, it lay within the arbitrary power of the [township officials] to favor either of these two low bidders." Id.

The same potential for favoritism arises from the bid format employed by the Department. Since one bidder could have a higher gross percentage and a lower minimum dollar figure and another the reverse, the Department could inform the bidders after the bids were opened that one or the other of these figures was the determining one and thereby "juggle" the proposals in order to favor a bidder.

The requirement that bidders submit estimates of the annual

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amount that will be collected does not provide the requisite common standard. The receipt of such estimates by various bidders does not provide a common figure by which to determine whose bid will provide the most revenue, but simply provides an opportunity for additional "juggling" of calculations after the bids are received in order to determine whose proposal would provide the greatest revenue.

If a history of the use of such machines at the subject sites would provide a reasonable estimate of potential gross receipts, that estimate should have been specified in the bid package so that the bidders and the Department would be calculating the amounts proposed from a common set of figures.

In order to provide the necessary "common standard," the Department has several options. It may require estimates of both the gross percentage and minimum but specify which is the primary one that will be used to calculate the highest bid. For example, the Department may inform bidders that the highest bidder will be the one which proposes the highest gross percentage, unless more than one bidder submits identical figures, in which case the highest bidder will be that bidder who, among those who submitted the highest gross percentage, submits the highest annual minimum. In addition, the Department may specify either a gross percentage amount or a minimum annual sum. These are two obvious ways to avoid the problems discussed above. There may be others which protect the Department's interest in encouraging competition without allowing unacceptable discretion in determining the highest bid.

Noncompliance with Specifications

The "Bid Invitation" and other bid documents specified "binocular viewing machines." You have informed this office that the Department's decision to award the concession lease to Bear was based, at least in part, on the fact that it proposed monocular as well as binocular equipment.

In order to provide full competition, the bids must respond to the equipment or other items specified in the bid. As noted in Hillside Twp. v. Sternin (1957) 25 N.J. 317, 136 A.2d 265:

The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition. Every element which enters into the competitive scheme should be required equally for all and should not be

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left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders. [citations] So it follows that all bids must comply with the terms imposed, and any material departure therefrom invalidates a nonconforming bid as well as any contract based upon it. If this were not the rule, the mandate for equality among bidders would be illusory and the advantages of competition would be lost. [citations]

The Department's bid calls for binocular equipment. To award the contract to a bidder who offers equipment different from what is specified in the bid package is unfair to the other bidder because it places the bidders on an unequal footing and stifles competition.

The conclusion that the award to bear was improper because its bid was nonresponsive should not suggest that the Department has no right to compare different types of equipment and select that which would best serve the public. If the Department is unsure which type of equipment is preferable, it may first investigate the matter and then specify in the bid package the type of equipment that it has determined is the best for the purpose at hand. If such a procedure is impractical, it may specify in the bid package that bidders are to propose various types of viewing equipment and that selection of the highest responsible bidder will be based in part on the Commission's determination as to which type of equipment will best serve the public interest in enjoying the scenery, or whatever objective is sought. The Commission would thus be able to choose the type of machine it determines best without putting at a disadvantage a bidder who conforms to the specifications only to learn that such conformance contributed to his loss of the bid.

Retention of Right to Negotiate
with Highest Responsible Bidder

The "Instructions to Bidders" provides in part as follows:

The Commission reserves the right to negotiate the terms and conditions with the highest responsible bidder.

The right to negotiate retained by the Commission nullifies the purpose of the competitive bid procedure since it empowers the Commission to enter into a contract under terms that are less

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advantageous to the public than those contained in the bid accepted or, indeed, than those contained in any other bid.

City Attorney Opinion No. 52-582 considered the legality of a similar provision in bid specifications which called for renegotiation of the bid price during specified periods after the contract was awarded.

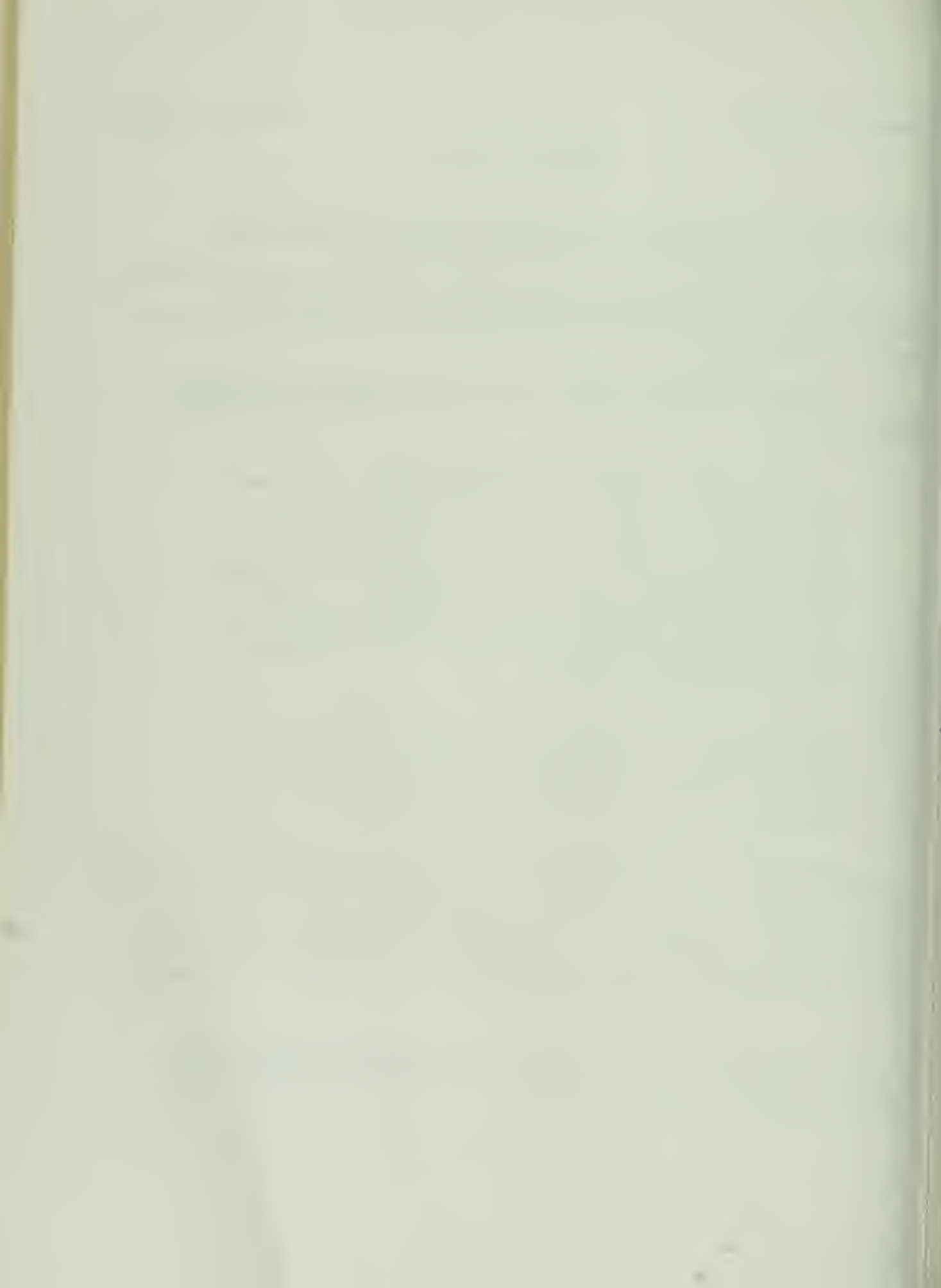
The City Attorney quotes a portion of Morse v. City of Boston, (1925) 253 Mass. 247, 148 N.E. 813 which is applicable here as well:

" . . . the terms and purpose of the . . . statutes [requiring competitive bidding] constitute in themselves a restriction on the power to amend and alter a contract, once made in accordance therewith. It cannot be changed in vital and essential particulars without observance of all the formalities prescribed by the statutes. . . . The city officers have authority doubtless to add to or to change the contract within reasonable limits in order to remedy incidental defects and to improve the work in minor details. . . .

" . . . It would be a vain thing for the Legislature to establish these safeguards for the public treasury to govern the initial execution of a contract and yet to permit all the evils thus prohibited to be accomplished by amendment or alteration of such a contract when once executed.

The purpose of the provision retaining the right to negotiate may well be to allow negotiation on matters which would be of benefit to the public and would be consistent with the purpose underlying the use of the competitive bidding procedure. However, as it reads now, it empowers the Commission to enter into an agreement which would provide the City with less money and inferior service than that offered in the winning bid and, therefore, should not be used.

A provision allowing negotiation with the highest responsible bidder would be proper if the circumstances were appropriately delineated. This office would be happy to assist you in drafting such a provision



OPINION NO. 80-49

CONCLUSION

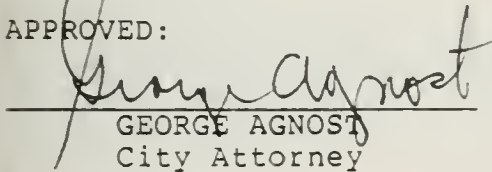
The Recreation and Park Commission is not required by law to engage in a competitive bid procedure before entering into the concession lease under consideration. However, the Board of Supervisors has a policy of refusing to approve such leases unless the department or agency submitting the lease for approval has determined the appropriate lessee by means of competitive bidding procedures. In order to satisfy this requirement, the Department must either provide the Board with sufficient information to enable it to determine that competitive bidding was "impractical or impossible," or it must initiate the bidding process anew in order to determine the highest responsible bidder.

Very truly yours,



PAULA JESSON
Deputy City Attorney

APPROVED:


GEORGE AGNOST
City Attorney

7849b
447y

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

August 6, 1980

OPINION NO. 80-50

SUBJECT: Declaration and Certification of Election Results

REQUESTED BY: Gilbert H. Boreman
Clerk of the Board of Supervisors

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

DOCUMENTS

AUG 15 1980

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QUESTION PRESENTED

Is the Board of Supervisors or the Registrar of Voters the proper governmental entity to declare and certify election results in the City and County of San Francisco?

CONCLUSION

The Registrar of Voters certifies election results in the City and County of San Francisco. The Board of Supervisors declares election results in the City and County of San Francisco.

ANALYSIS

You have advised this office that, for some time now, the Registrar of Voters, upon completion of the canvass of election returns, has submitted to the Board of Supervisors a declaration and certification of the results of each election; the documents are received and placed in the Board's general files, and the Board does not itself declare or certify the election results, as to do so "would be duplicative of the action of the Registrar of Voters." You have also advised this office that, pursuant to Government Code Section 34464, in connection with charter revisions, repeal and amendments, the Board does submit a copy of the Registrar's declaration and certification to the Secretary of State. You ask whether the established procedure is in accord with the law.

Initial Definitions

The following items are not defined in the California Elections Code. We therefore turn to case law for definitions.

"To canvass" means to examine the ballots (Green v. Stoddard [] 109 NYS 2d 395, 398), to count the votes (Graham v. Peters [1910] 248 Ill. 50, 93 NE 315, 316), and to tally the returns (In re Stewart [1897] 24 App. Div. 20, 48 NYS 957, 963).

"To certify" means to give certain knowledge or information of, make evidence, to vouch for the truth of, attest to, to make statement to as a matter of fact, to testify in writing, to give a certificate of, or make a declaration about, in writing, under hand or under a seal. People ex rel. Smith v. Foster (1899) 27 Misc. 576, 58 NYS 574, 579.

"To declare" means to make known publicly, formally or explicitly, especially by language; to announce or proclaim. Oak Grove School District v. City Title Insurance Company (1963) 217 Cal.App.2d 678, 705.

Earlier Practice And Law

Before embarking upon our review of current law, we note that the Clerk of the Board of Supervisors directed a similar inquiry to this office in 1947. At that time, pursuant to established practice, the Board of Supervisors, by resolution prior to the election, authorized the Registrar of Voters to canvass the election results. This office concluded, in Opinion 4024 dated October 30, 1947, that the Board could lawfully, by resolution after an election, delegate the clerical work of canvassing to the Registrar, but that the Board must by law retain the duty of certifying. This conclusion was based on Section 9 of the Charter, which at that time provided in relevant part:

It shall be the duty of the board of supervisors to canvass the vote cast at each election in the City and County and certify the official count of such balloting.

Thus, in San Francisco, the board of supervisors served as the county election board and as such had two duties: to canvass and to certify election returns. However, this office also noted that Elections Code Section 7921 (as it then provided) allowed a county election board either to canvass the returns itself or by resolution to order the county clerk to make the

canvass. Pursuant to then Elections Code Section 17, in San Francisco, the county clerk meant the registrar of voters. Thus, according to the law at the time, the Board certified election results after the Registrar canvassed them and reported to the Board.

It will be seen below that the law has changed. Former Charter Section 9 has been replaced by Charter Section 2.101; the powers of the Board of Supervisors no longer include any reference to canvassing and certifying election results. The above-mentioned Elections Code Section 7921 (Elections Code of 1939) became Section 18401 in the Elections Code of 1961 and was repealed in 1975. New procedures were added to the law by Stats 1975, c. 1203, p. 2991 et. seq.

Further Definitions

Elections Code Section 4 states: "Unless the provision or the context otherwise requires, these [the following] general provisions, rules of construction, and definitions shall govern the construction of this code". And Elections Code Section 14 provides: "'Clerk' means county clerk, registrar of voters, city clerk, or other officer or board charged with the duty of conducting any election." This definition turns our analysis to the question: what officer or board is charged with the duty of conducting elections in San Francisco?

San Francisco Charter Section 9.102 states, in relevant part:

The conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the city and county shall be vested exclusively in the registrar of voters.

We therefore conclude that the term "clerk" as used in the Elections Code refers to the Registrar of Voters in San Francisco. We must now determine the meaning of the term "governing body" as used in the Elections Code.

The annotation of Elections Code Section 17111 refers us to Government Code Section 5402 for the definition of this term. Section 5402 describes "governing body" as

. . . the board of supervisors, city council, board of directors or any other legislative or governing body which has the power to fix the annual tax or assessment levy for a public body.

We therefore conclude that the term "governing body" as used in the Elections Code refers to the Board of Supervisors in San Francisco.

Current Practice and Law

We now proceed to describe the duties of the Registrar and of the Board in certifying and declaring election results. San Francisco Charter Section 9.107 provides, in relevant part:

The canvas [sic] of voters, canvas [sic] of returns, declaration of election and certificate of election shall be made as provided by general law. . . .

We therefore turn to the state statutes for guidance in answering your question.

The Elections Code, Division 12 (Canvass, Declaration of Results), Chapter 8 (Official Canvass), begins at Section 17080, which provides: "This chapter applies to all elections." Section 17081 states in relevant part: "The clerk [the Registrar of Voters in San Francisco] shall conduct the official canvass, ..." Section 17088 provides in relevant part: "The clerk [Registrar of Voters] shall prepare a certified statement of the results of the election and submit it to the governing body [The Board of Supervisors in San Francisco]. . . ."

The Elections Code, Chapter 10 (Announcement of Returns), Section 17111 (Declaration of Results) states:

The governing body [Board of Supervisors] shall declare elected or nominated to each office voted on at each election under its jurisdiction the person having the highest number of votes for that office, or who was elected or nominated under the exceptions noted in Section 17110. The governing board shall also declare the results of each election under its jurisdiction as to each measure voted on at such election.

And Section 17112 (Certificates of Election or Nomination) of that Chapter requires that:

The clerk [Registrar of Voters] shall make out and deliver to each person elected or nominated, as declared by the governing body [Board of Supervisors], a certificate of election or nomination, signed and authenticated by the clerk.

The Registrar conducts the official canvass. Elections Code Section 17081. The Registrar prepares a certified statement of the results and submits it to the Board. Elections Code Section 17088. The Board declares each person elected or nominated and the results as to each measure. Elections Code Section 17111. The Registrar signs and authenticates a certificate of election or nomination and delivers it to each person elected or nominated. Elections Code Section 17112. It thus appears that current practice is not in accord with current law, and that the Board must following future elections prepare a written declaration of election results.

You have called our attention to Government Code Section 34464, which provides, in pertinent part:

Three copies of the complete text of a charter proposal or of any revised, amended or repealed section ratified by the electors of a city or city and county shall be certified and authenticated by the chairman and clerk of the governing body and attested by the city clerk, setting forth the submission of the charter to the electors of the city, and its ratification by them. . . . In the case of a city and county, one copy shall be filed with the recorder thereof, and one in the archives of such city and county.

The third copy shall be submitted to the Secretary of State with the following:

(a) Certified copies of all publications and notices required of the city by this chapter or by the laws of this state in connection with an election to propose, revise, amend or repeal a city charter.

(b) Certified copies of any arguments for or against the charter proposal, revision, amendment or repeal which were mailed to voters pursuant to Section 5012 of the Elections Code.

(c) A certified abstract of the vote at the election at which the charter proposal, revision, amendment, or repeal was approved by the voters.
(Emphasis added.)

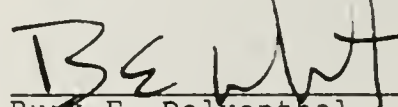
According to this provision of the law, whenever a charter proposal or any revised, amended or repealed charter section is ratified by the voters, the chairman (President) and clerk of the Board of Supervisors must certify and authenticate three copies of the complete text of such charter or charter

section. Together with the Registrar's certification and the Board's declaration of the election results as to these measures, the Board's certified and authenticated texts are filed with the recorder, in the archives of the City and County, and with the Secretary of State. The Secretary of State also receives certain other election material.

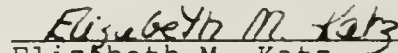
The certification role of the Board of Supervisors in the above matter is different from the certification role of the Registrar of Voters in general. The Board certifies the texts of the charter provisions, not the election results.

In view of the analysis above, we advise you that the Registrar of Voters is to certify election results and the Board of Supervisors is to declare election results. Current practice must be altered to conform to the Elections Code.

Respectfully submitted,



Burk E. Delventhal
Deputy City Attorney



Elizabeth M. Katz
Legal Assistant

APPROVED:

GEORGE AGNOST
City Attorney
7630b





George Agnost,
City Attorney

August 8, 1980

OPINION NO. 80 - 51

SUBJECT: Application of State Election Laws or Charter to
Election of Members of the Board of Education

REQUESTED BY: Jay Patterson
Registrar of Voters

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

DOCUMENTS DEPT.

AUG 12 1980

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QUESTIONS PRESENTED

1. Does Elections Code Section 10012 or Charter Section 9.105 govern statements of qualifications by candidates for the Board of Education in San Francisco?
2. Does Election Code Section 23302.5 or Charter Section 9.104 govern the time for filing nomination papers by candidates for the Board of Education in San Francisco?

CONCLUSIONS

1. Charter Section 9.105 governs statements of qualifications by candidates for the San Francisco Unified School District Board of Education.
2. Charter Section 9.104 governs the time at which candidates for the San Francisco Unified School District Board of Education must file nomination papers.

ANALYSIS

You have asked this office whether the San Francisco Charter or the California Elections Code governs election procedures for members of the San Francisco Unified School District Board of Education. You have asked specifically about

two election procedures concerning statements of qualifications and nomination papers. The first procedure is the subject of both Elections Code Section 10012 and Charter Section 9.105; the second procedure is covered by both Elections Code Section 23302.5 and Charter Section 9.104. However, our analysis properly begins with the California Constitution.

Article XI, Section 5, subdivision (b) of the state constitution grants plenary authority to provide in city charters for

the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed. . . .

And Article IX, Section 16, subdivision (a) of the state constitution provides:

It shall be competent, in all charters framed under the authority given by Section 5 of Article XI, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the state for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards.

San Francisco has availed itself of this authority in regard to the board of education of the San Francisco Unified School District in Article V, Section 5.100 and Article IX, Section 9.100 of its Charter. (Article V, Section 5.104 of the Charter covers the board of education of the San Francisco Community College District.) Thus the City, through its Charter, has adopted the members of these school boards as municipal officers and has made their election a municipal affair.

This is the same conclusion reached by the Court of Appeal in City of Oakland v. Oakland Unified School District (1956) 138 Cal.App.2d 406. There the Court noted that the state constitution, through then Article XI, Section 8-1/2, subdivision 2, empowered charter cities to provide in their charters "for the manner in which, the times at which, and the terms for which the

members of boards of education shall be elected or appointed. . . .
." The Court further noted that Oakland, in adopting its charter, had voluntarily availed itself of this right. Therefore, the school board members must be considered municipal officers and their election a municipal affair (Id., at 409).

It has long been held that the conduct of municipal elections is a municipal affair, subject to municipal control. See People v. Worswick (1904) 142 Cal. 71, 75, where the California Supreme Court held that general laws regarding registration had no bearing on the election of city officers in a municipality governed by a freeholders' charter, except insofar as the general laws were adopted by the charter itself. Thus a mayoral election in the charter city of San Jose was a municipal affair, and the city could have adopted any system of registry, or declined to have any at all. And see Socialist Party v. Uhl (1909) 155 Cal. 776, 788, where the California Supreme Court held that general laws regarding primaries were not binding upon a municipality as to matters which were strictly municipal affairs. Thus a primary election for municipal officers in the charter city of San Francisco was a municipal affair, and the Court denied a petition for a writ of mandamus to compel the election commissioners and the registrar of voters to receive petitions and to hold a primary election in which the Socialist Party was entitled to participate.

In Scheafer v. Herman (1916) 172 Cal. 338, the California Supreme Court considered whether signatories of recall petitions in San Francisco had to date their signatures. The Court noted that recall of municipal officers was a municipal affair and that, where, as in San Francisco, a charter provided a mode of recall, general law could not control (Id. at 340). The scheme for recall of municipal officers provided in the San Francisco charter did not require those who signed a recall petition to give the date of their signatures, whereas then Political Code Section 1083a did contain this requirement. The Court rejected the argument that Section 1083a was an independent, supplemental provision which applied in San Francisco because the charter was silent as to the dating of signatures; the Court held, at 343:

The provisions of the general law requiring him [the signatory of a recall petition] to add the date of his signature being . . . inconsistent with the provisions of the charter which allowed him to make [sic] a recall petition without such date, it follows that it does not apply to or affect proceedings for recall under the charter.

Two, more recent, cases are particularly pertinent to the subject of this Opinion. In Mackey v. Thiel (1968) 262 Cal.App.2d 362, the Court of Appeal held that a general law regarding candidates' statements of qualifications (Elections Code Section 10012.5, which is now Elections Code Section 10012) did not apply to the election of a municipal officer (a member of the city council) in a chartered city (Los Angeles) where: (1) the courts have already determined that the conduct of a municipal election is a municipal affair subject to municipal control and (2) the city's election code, adopted pursuant to then California Constitution Article XI, Section 8-1/2 and to the city charter, made no provision for candidate qualification statements, but rather only required information respecting issues, to be included with the mailing of sample ballots.

And in Rees v. Layton (1970) 6 Cal.App.3d 815, candidates for mayor, city council and the board of education of the charter city of Los Angeles raised the question whether ballot designations were governed by general law (Elections Code Section 10219) or by the city's elections code. The Court of Appeal noted that then Article XI, Section 8-1/2 of the California Constitution granted plenary authority to provide in city charters for the manner in which members of the board of education were to be elected, for the manner in which municipal officers and employees were to be elected and for the manner in which any municipal election was to be held. Thus the conduct of municipal elections was a municipal affair, subject to municipal control; and, in conflicts with general laws, the charter provisions concerning municipal elections would prevail (Id. at 820). Therefore, Elections Code Section 10219 did not apply in the charter city of Los Angeles, which had provided for the manner in which municipal officers were to be elected (Id., at 821-822).

It is readily apparent, from the cases cited supra, that municipal control over the election of municipal officers, including members of a board of education, is accorded broad deference. General election laws will not apply to the election of municipal officers unless the charter itself adopts them. The fact that a charter is silent as to certain procedures for the election of municipal officers does not make general election laws on that subject applicable. And when the charter sets forth procedures for the election of municipal officers which conflict with provisions of the general election law, the charter provisions govern. We now apply these rules of law to the instant questions.

Article IX of the San Francisco charter concerns elections. Section 9.100 (Elective Officers and Terms) names members of the board of education among the elective officers of San Francisco. Section 9.103 (Municipal Elections) makes all provisions of the general laws of this state

. . . respecting the registration of voters, initiative, referendum and recall petitions, elections, canvass of returns, and all matters pertinent to any and all of these, . . . applicable to the city and county except as otherwise provided by this charter or by ordinance adopted [pursuant thereto]. (Emphasis added.)

Charter Section 9.104 (Nomination of Elective Officers) provides, in relevant part:

The name of a candidate for an elective office shall be printed upon the ballot when a declaration of candidacy and certificate of not less than twenty nor more than thirty sponsors shall have been filed on his behalf, and when the nomination shall have been made in the following manner: The candidate, not more than seventy-five days before the municipal election in November, shall file with the registrar a declaration of his candidacy, in the form prescribed by the registrar for all candidates, including statements of his qualifications not to exceed one hundred words, subscribed by him before the registrar. The registrar shall forthwith certify to the said subscription and its date and retain and file the declaration. The candidate shall pay to the registrar at the time of filing his declaration of candidacy a sum equal to two percent (2%) of the current annual salary for the office for which he is a candidate. In lieu of such filing fee, a candidate may submit to the registrar signatures of voters registered in San Francisco as provided in the general laws of this state. After said declaration shall have been signed, certified and filed, and not later than sixty days before the election each candidate shall file with the registrar, on forms furnished by him, not less than twenty nor more than thirty sponsors, who are electors qualified to vote at the said

municipal election and who shall sign and certify under the penalty of perjury to the qualifications of said candidate.

Charter Section 9.104 thus provides for the time in which to file nomination papers, as does Elections Code Section 23302.5:

Notwithstanding any other provision of the law, whenever other elections are consolidated with the statewide general election, the period for the filing of nomination documents by candidates in elections consolidated with the general election shall commence on the 113th day prior to the election. The nomination documents shall be filed not later than 5 p.m. on the 88th day prior to the general election in the office of the county clerk during regular office hours.

Under the rules of law discussed above, the charter provisions govern.

Charter Section 9.104 provides that candidates submit statements of their qualifications and names of sponsors. Charter Section 9.105 provides, in relevant part:

The registrar shall, before each municipal election, cause to be printed in pamphlet form and mailed to each registered voter with the sample ballot, a copy of all statements of qualifications of candidates received by him, to be followed by the names and addresses and occupations of all sponsors of all officers to be voted for in said city and county.

Elections Code Section 10012, formerly Section 10012.5, concerning candidates' statements, provides:

Each candidate for nonpartisan elective office in any local agency, including any city, county, city and county or district, may prepare a candidate's statement on an appropriate form provided by the clerk. Such statement shall include the name, age and occupation of the candidate and a brief description of no more than 200 words, of the candidate's education and qualifications expressed by the candidate himself; provided, however, that the governing body of such local agency may authorize an increase in the limitations on words for such

statement from 200 to 400 words. Such statement shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations. Such statement shall be filed in the office of the clerk when his nomination papers are returned for filing, if it is for a primary election, or for an election for offices for which there is no primary. Such statement shall be filed in the office of the clerk no later than the 60th day before the election, if it is for an election for which nomination papers are not required to be filed. It may be withdrawn, but not changed, during the period for filing nomination papers and until 5 p.m. of the next working day after the close of the nomination period.

The clerk shall send to each voter together with the sample ballot, a voter's pamphlet which contains the written statements of each candidate that is prepared pursuant to this section. The statement of each candidate shall be printed in type of uniform size and darkness, and with uniform spacing. The clerk shall provide a Spanish translation to those candidates who wish to have one, and shall select a person to provide such translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of Schools and Colleges.

The local agency may estimate the total cost of printing, handling, translating, and mailing the candidate's statements filed pursuant to this section, and may require each candidate filing a statement to pay in advance to the local agency his or her pro rata share as a condition of having his or her statement included in the voter's pamphlet.

The clerk shall reject any statement, which contains any obscene, vulgar, profane, scandalous, libelous or defamatory matter, or any language which in any way incites, counsels, promotes or advocates hatred, abuse, violence or hostility toward, or which tends to cast ridicule or shame upon any person or group of persons by

reason of sex, race, color, religion or manner of worship, or any language or matter the circulation of which through the mails is prohibited by Congress.

Nothing in this section shall be deemed to make any such statement or the authors thereof free or exempt from any civil or criminal action or penalty because of any false, slanderous or libelous statements offered for printing or contained in the voter's pamphlet.

The governing body of the local agency may adopt regulations to permit each candidate for elective office to prepare separately other materials to be sent to each voter in addition to the sample ballot and the voter's pamphlet. Such regulations may pertain to size, weight, form, physical composition, and content of such other materials and may specify that the cost of handling, packaging and mailing may be borne by the local agency authorizing the same or may be billed in whole or in part to the candidate submitting the materials. Such regulations shall apply equally to all candidates, including incumbents. Before the nominating period opens, the local agency for that election shall determine whether a charge shall be levied against that candidate for the candidate's statement or other materials sent to each voter. Such decision shall not be revoked or modified after the seventh day prior to the opening of the nomination period. A written statement of the regulations with respect to charges for handling, packaging, and mailing shall be provided to each candidate or his representative at the time he picks up his nomination papers.

For purposes of this section, and Section 10012.5, the Board of Supervisors shall be deemed the governing body of judicial elections.

Rees v. Layton, supra, is dispositive of the question here: the charter provisions clearly apply.

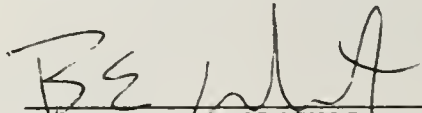
August 8, 1980

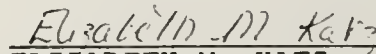
CONCLUSION

Article XI, Section 5, subdivision (b), and Article IX, Section 16, subdivision (a) empower the City and County of San Francisco, through its charter, to make members of the board of education of the San Francisco Unified School District municipal officers and to make their election a municipal affair. The City and County of San Francisco has availed itself of this authority through Article V, Section 5.100 and Article IX, Section 9.100 of its Charter. The conduct of municipal elections, a municipal affair, is subject to municipal control. General election laws will not apply to the election of municipal officers unless the charter itself adopts them. The fact that a charter is silent as to certain procedures for the election of municipal officers does not make general election laws on that subject applicable. And when the charter sets forth procedures for the election of municipal officers which conflict with provisions of the general election law, the charter provisions govern. The San Francisco Charter has provided a complete scheme for the nomination of elected municipal officers, including members of the board of education. The San Francisco Charter has likewise provided for the submission and distribution of candidates' statements of qualifications. These provisions govern.

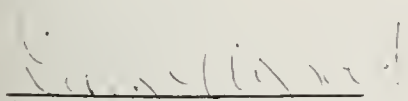
You are so advised.

Respectfully submitted,


BURK E. DELVENTHAL
Deputy City Attorney


ELIZABETH M. KATZ
Legal Assistant

APPROVED:


GEORGE AGNOST
City Attorney
8195B
EMK/ay



George Agnost,
City Attorney

August 13, 1980

OPINION No. 80 - 52

SUBJECT: Conflict of Interest

REQUESTED BY: Patrick McGrew
Landmarks Preservation Advisory Board

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

DOCUMENTS DEPT.

AUG 14 1980

CITY OF SAN FRANCISCO
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When an architect member of the Landmarks Preservation Advisory Board has a close business association of a continuing nature with a client who contemplates purchasing a structure which has been designated as a landmark, does a conflict of interest exist if:

- (1) The client purchases the structure?
- (2) The client hires another architect and applies to the Board for a Certificate of Appropriateness?
- (3) The client retains the architect member of the Board and applies to the Board for a Certificate of Appropriateness?

CONCLUSIONS

- (1) No.
- (2) Yes.
- (3) Yes.

ANALYSIS

You have advised this office that you are an architect and that you have served as an architectural consultant for a certain client. The nature and quantity of your work for this client has brought you an average of \$5,000 - \$10,000 per year in fees, and you anticipate that your business relationship with this client.

will continue. Your client now contemplates purchasing a structure which has been designated as a landmark. If your client purchases the structure, he intends to make certain improvements which will require that he obtain a Certificate of Appropriateness from the City Planning Commission. The Landmarks Preservation Advisory Board, of which you are a member, will advise the City Planning Commission as to the grant or denial of this Certificate. You ask whether you will have a conflict of interest if your client merely purchases the structure, if your client (having purchased the structure) hires another architect to consult on proposed improvements and applies for a Certificate of Appropriateness, and if your client (having purchased the structure) employs you as the consulting architect on proposed improvements and applies for a Certificate of Appropriateness. Our analysis begins with a brief review of the status and relevant duties of the members of the Landmarks Preservation Advisory Board.

Chapter II of the San Francisco Municipal Code (City Planning Code) includes Article 10 (Preservation of Historical, Architectural and Aesthetic Landmarks). Section 1003 (Ordinance No. 27-67, approved January 28, 1967) therein provides, in relevant part:

There is hereby created a Landmarks Preservation Advisory Board (hereinafter referred to as the Advisory Board), which shall advise the Department [of City Planning] and the [City] Planning Commission on historical preservation matters. The Advisory Board shall consist of nine voting members appointed by the Mayor and serving at his pleasure, without salary. Of the original appointments, five shall be for a four-year term and four for a two-year term; after the expiration of the said original terms, all appointments shall be for four-year terms. In addition, the Art Commission shall choose one of its members to be an ex-officio member of the Advisory Board, without vote.

As we shall see below, by operation of this law, members of the Advisory Board are officers of the City and County of San Francisco.

Section 1006 provides. in relevant part:

In the case of

1. any construction, alteration, removal or demolition of a structure or any work involving a sign, awning, marquee, canopy or other appendage, for which a city permit is required, on a landmark site or in a historic district,. . . a Certificate of Appropriateness shall be required
. . . .

And Section 1006.4 requires:

Where a public hearing before the Planning Commission has been scheduled thereon, the application for a Certificate of Appropriateness shall be promptly referred to the Advisory Board and shall be considered by the Advisory Board at its next regular meeting, or at a special meeting called for that specific purpose. The Advisory Board shall render a report to the Planning Commission at or prior to the scheduled public hearing; failure of the Advisory Board to consider the application or to render a report shall not constitute grounds for continuation of the public hearing.

As we shall see below, if your client purchases a structure which has been designated as a landmark and applies for a Certificate of Appropriateness while you are a member of the Advisory Board, you will have a conflict of interest prohibited by the Charter of the City and County of San Francisco.

We turn first to the definition of a public officer. Charter Section 1.103 enumerates the officers of the City and County of San Francisco. That Section provides, in relevant part: "The officers of the city and county shall be . . . members of boards and commissions appointed by the mayor, ..." We have already seen that, pursuant to City Planning Code Section 1003, Advisory Board members are appointed by the Mayor. It is therefore clear that members of the Advisory Board are public officers of the City and County of San Francisco.

As such, they are subject to the conflict of interest provisions of Charter Section 8.105. Subdivision (a) of that Section provides, in relevant part:

No member of any board or commission shall accept any employment relating to the business or the affairs of any person. firm or corporation which are subject to regulation by the board or commission of which he is a member.

The Advisory Board participates in the regulation of landmark structures through the Certificate of Appropriateness process. Therefore, if your client purchases a structure which has been designated as a landmark, employs you as the architectural consultant for improvements thereto, and applies for a Certificate of Appropriateness, which must be referred to the Advisory Board of which you are a member, before a Certificate be granted or denied, you will have a conflict of interest prohibited by Charter Section 8.105(a).

Subdivision (f) of that Section further provides:

No officer or employee shall have an interest in any matter for his consideration or determination which arises from a close business association of a continuing nature. A close business association of a continuing nature means any undertaking for profit, including, but not limited to, a corporation, partnership, officeholding or employment in or by any labor or employee organization, trust, proprietorship, association, or joint venture.

The basis for this provision was explained by the Court of Appeal in Stockton P. & S. Co. v. Wheeler (1924) 68 Cal.App. 592, 601, where the Court stated that the conflict of interest principle

evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed.

In Miller v. City of Martinez (1938) 28 Cal.App.2d 364, 370, the Court of Appeal pointed out that direct financial gain need not be involved.

It would thus appear that the "interest" need not involve any direct financial gain upon the part of the public official. It may be any interest which would prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves. He should be absolutely free from any influence other than that which may grow out of the obligations he owes the public.

Moreover, actual impropriety need not be involved. In Witt v. Morrow (1977) 70 Cal.App.3d 817, Morrow was a member of a city council which adopted a redevelopment plan for a shopping center. Morrow was also a \$550/month president and attorney for a non-profit corporation which subsequently purchased properties across the street from the shopping center and another parcel "very close" to the center. Morrow argued that his financial interest was too remote to cause a conflict of interest, while Witt, the city attorney, sought to enjoin Morrow from further participating in redevelopment decisions concerning the shopping center on the ground that such decisions could have a significant impact on the value of the corporation's properties and thus affect Morrow's activities and income from the corporation. The Court held, at 823, that

His [Morrow's] concept of what constitutes a conflict of interest is too narrow. It is not just actual improprieties which the law seeks to forestall but also the appearance of possible improprieties. Any employee, in the private or public sector, wishes to keep his job and maintain good relations with his employer. A person who must make decisions which may affect his employer's purse is in a situation where he may not give full consideration to the merits of the decision.

In the instant matter, the grant or denial of a Certificate of Appropriateness may affect the value of the property purchased by one with whom you have had, and with whom you expect to have, a close business association. The effect on your client's property value may in turn affect the fees you will receive from him. If he is displeased with the decision of the Advisory Board of which you are a member, he may refuse to ask for your services in the future. If he is pleased, he may increase the amount of fees for your services or seek out your services more frequently, though at the same rate of remuneration. Therefore, even if your client employs another architect in regard to the improvements for which he will seek a Certificate, you may be said to have an interest in the outcome of your client's application and thus have a conflict prohibited by Charter Section 8.105(f).

If your client purchases a structure which has been designated as a landmark and applies for a Certificate of Appropriateness while you are a member of the Advisory Board, you must avoid the conflicts prohibited by Charter Sections 8.105(a) and (f) by relinquishing either your business association or your municipal office.

August 13, 1980

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Patrick McGrew
Landmarks Advisory Board

However, we find nothing in Charter Section 8.105 which defines a conflict of interest when your client simply purchases a structure designated as a landmark. As long as your client does nothing which calls upon you, as a member of the Advisory Board, to consider and make a determination regarding his property, no conflict can exist.

You are so advised.

Respectfully submitted,

B. E. Delventhal
Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Elizabeth M. Katz
Legal Assistant

APPROVED BY

George Agnost
GEORGE AGNOST
City Attorney
EM/ay
8235b

 George Agnost,
City Attorney

August 13, 1980

OPINION NO. 80 - 53

SUBJECT: Removal of Members of the Advisory Committee on
Drug Abuse for Failure to Attend Meetings

REQUESTED BY: Gilbert H. Boreman, Clerk
Board of Supervisors

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

DOCUMENTS DEPT.

AUG 24 1980

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QUESTIONS PRESENTED

1. May a City and County of San Francisco board or commission prescribe a rule, through its by-laws, for the removal of a member for failure to attend meetings?
2. May the Advisory Committee on Drug Abuse remove one of its members for failure to attend committee meetings?

CONCLUSIONS

1. Absent statutory authority, a City board or commission may not provide for the removal of a member for failure to attend meetings.
2. The Advisory Committee on Drug Abuse may not remove one of its members for failure to attend committee meetings unless San Francisco Administrative Code Section 15.9, by which the committee was established, is amended to so empower the committee.

ANALYSIS

You have advised this office that the Advisory Committee on Drug Abuse, through its by-laws, calls for termination of a member who misses three consecutive meetings. On July 24, 1980, the Rules Committee of the Board of Supervisors was asked to consider an appointment to fill a "vacancy" on the Advisory Committee created by operation of this by-law. You have asked whether the Advisory Committee is authorized to provide for the removal of one of its members and under what circumstances the Advisory Committee may so remove a member. We look first to the legislation creating the committee.

California Welfare and Institutions Code Section 5606.5 provides, in relevant part:

Each county shall have an advisory committee on drug abuse, the members of which shall be appointed by the board of supervisors. The committee may be either independent or under the jurisdiction of the advisory board established pursuant to Section 5604 at the option of the board of supervisors. The membership of the advisory committee shall be composed of representatives of law enforcement agencies, public drug programs, private drug programs, education, and the general public selected by the board of supervisors.

There is no provision for term of office or for removal from office in this Section.

San Francisco Administrative Code Section 15.9 carries out the mandate of California Welfare and Institutions Code Section 5606.5. Section 15.9 provides, in relevant part:

Pursuant to Section 5606.5 of the California Welfare and Institutions Code, there shall be an advisory committee of seventeen (17) members, known as the Advisory Committee on Drug Abuse, who shall be appointed by the Board of Supervisors. One member shall be a member of the Mental Health Advisory Board. Two members shall be from law enforcement. Six members shall be members of the Coordinating Council on Drug Abuse. One member shall be from education. Seven members shall be from the general public representative of the public interest in drug abuse, of which at least one member shall be a resident of each of the five mental health districts. The term of each member shall be for two years; provided, however, that of the members first appointed, three members from the Coordinating Council on Drug Abuse, one member from the Mental Health Advisory Board, one member from education, one member from law enforcement, and three members from the general public shall have an initial term of one year. If, however, prior to the expiration of a term a member ceases to retain the status which qualified him for appointment on the committee, his membership on the committee shall terminate and there shall be a vacancy on the committee.

Section 15.9 sets forth the terms of office for members of the Advisory Committee and calls for termination of members who lose their qualifying status prior to the expiration of their terms of office. There are no other conditions for removal from office set forth in this Section.

However, other conditions for removal from office on any board or commission are found in the Charter of the City and County of San Francisco. Charter Section 8.107 (Suspension and Removal) provides, in relevant part:

Any appointee of the mayor or the board of supervisors guilty of official misconduct or convicted of crime involving moral turpitude must be removed by the mayor or the board of supervisors, as the case may be, and failure of the mayor or any supervisor to take such action shall constitute official misconduct on his or their part.

Thus a member of the Advisory Committee on Drug Abuse, appointed by the Board of Supervisors, must be removed by the Board, if he or she is found guilty of official misconduct or of a crime involving moral turpitude.

The Charter also provides, in Section 3.500, that:

Each board and commission appointed by the mayor, or otherwise provided by this charter, shall have powers and duties as follows:

(a) To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the distribution and performance of its business, [and] for the conduct and government of its officers and employees, ...

Thus it appears that, pursuant to this provision of the Charter, a board or commission might adopt by-laws requiring its members to attend its meetings or forfeit office. However, Section 3.500 also provides that:

A quorum for the transaction of official business shall consist of a majority of all the members of each board or commission, but a smaller number may adjourn from time to time and compel the attendance of absent members in the manner and subject to penalties to be provided by ordinance. (Emphasis added.)

Therefore, a requirement that members attend meetings or forfeit office properly belongs in an ordinance passed by the Board of Supervisors, rather than in the by-laws of a board, commission, or committee.

This conclusion is in accord with two rules of law enunciated by the courts of this state. First, a board may not confer the power of removal on itself through its by-laws. Wall v. Board of Directors (1904) 145 Cal. 468, 470. Second, the sovereign power that creates an office may also fix the terms on which it is held and may delegate the power of removal. French v. State of California (1905) 146 Cal. 604, 609.

Moreover, this conclusion is in accord with the procedure adopted for the Commission on the Status of Women. Section 33.3 of the San Francisco Administrative Code establishes the Commission (subdivision "a"), provides for the appointment of its members (subdivision "b"), sets forth the terms of office (subdivision "c"), and provides for the removal of any commissioner who misses three regularly scheduled meetings in any twelve-month period without the express approval of 51% of the members (subdivision "d").

This office was asked to determine the legality of the above provision before its enactment. In Opinion 75-9, January 27, 1975, we advised that the proposed provision "simply establishes a very potent method" of carrying out the authority of Charter Section 3.500 whereby a board or commission may compel the attendance of its members. In addition, we found no conflict with Charter Section 8.107.

Finally, we note here that the objective of a provision such as San Francisco Administrative Code Section 33.3, subdivision (d), is favored by public policy. At common law, a willful refusal to perform the duties of office required forfeiture of office. People v. Hartwell (1885) 67 Cal. 11, 12; Bergerow v. Parker (1906) 4 Cal.App. 169, 174. The common law rule has long been codified in California and is now embodied in Government Code Section 1770:

An office becomes vacant on the happening of any of the following events before the expiration of the term: . . .

(g) His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law. . . .

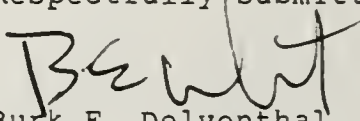
August 13, 1980

Government Code Section 1770, subdivision (g), does not apply in San Francisco because our Charter, through Section 3.500 and ordinances adopted pursuant thereto, establishes its own method of compelling attendance. We cite the general law only to illustrate public policy favoring the attendance of public officials to their duties.

If the members of the Advisory Committee on Drug Abuse still wish to compel attendance at their meetings and if the Board of Supervisors agrees that such requirement is desirable, the proper procedure is to amend Section 15.9 of the San Francisco Administrative Code to make such provision. Appropriate due process procedures should be included. The enabling legislation must contain the requirement that members of the Advisory Committee attend meetings; no such compulsion in the by-laws of the committee has any legal effect and therefore no vacancy exists on that ground.

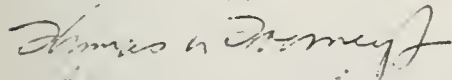
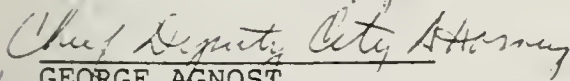
You are further advised that no board or commission of the City and County of San Francisco may, through its by-laws, compel attendance of its members at meetings. That power must find its genesis in the appropriate enabling legislation.

Respectfully submitted,


Burk E. Delventhal
Deputy City Attorney


Elizabeth M. Katz
Legal Assistant

APPROVED BY:



GEORGE AGNOST
City Attorney
EMK/ay
8256b

George Agnost,
City Attorney

August 15, 1980

OPINION NO. 80 - 54

SUBJECT: Charter Commission Powers and Procedures

REQUESTED BY: Glen Sparrow, Executive Director
Charter Commission

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

DOCUMENTS DEPT.

AUG 15 1980

CITY OF SAN FRANCISCO
FISCAL DEPT.

QUESTIONS PRESENTED

1. When the charter commissioners submit the revised charter to the clerk of the board of supervisors, must their signatures be notarized?

2. Does the charter commission have the power to submit amendments to the current charter?

3. May the charter commission submit an alternative proposition to the charter revision, for the method of electing the board of supervisors, or may the charter commission provide that the method in effect on a certain date be the method incorporated into the charter revision?

CONCLUSIONS

1. The signatures of the charter commissioners on the revised charter need not be notarized.

2. The charter commission is not empowered to submit amendments to the current charter.

3. The charter commission may either submit an alternative proposition for the method of electing the board of supervisors or provide that the method in effect on a certain date be the method incorporated into the revised charter.

ANALYSIS

You have asked this office a number of questions concerning the powers and procedures of the charter commission. This office has provided oral advice in order to enable the commission to meet statutory deadlines; we now provide written advice concerning those questions of enduring interest.

Signatures

Procedures for submission of a revised charter are set forth in the California Constitution, Article XI, Section 3, and in the California Government Code, Section 34450 et seq. Government Code Section 34455 provides, in relevant part:

The charter commissioners shall propose a charter for the government of the . . . city and county or revise a charter. The charter so prepared shall be signed by a majority of the charter commissioners and shall be filed in the office of the clerk of the governing body of the . . . city and county.

Government Code Section 34455, concerning the submission of a revised charter, does not require notarization of the signatures of the charter commissioners. Please see also our Opinion 80-43.

Amendments

The California Constitution, Article XI, Section 3, subdivision (b) provides:

The governing body or charter commission of a county or city may prepare a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

Government Code Sections 34451 through 34457 provide for the method of proposing or revising a charter by a charter commission. Government Code Section 34458 provides for the proposal or revision of a charter by the governing body. Government Code Sections 34459 through 34461 spell out procedures for amending or repealing a charter.

It is clear from the constitutional and statutory authority referred to above, and from our extensive discussion in Opinion 80-46, that the proposal or revision of a charter may be accomplished only by a charter commission or by a governing body,

while the amendment or repeal of an existing charter may be accomplished only by a governing body or by the voters through the initiative process. A charter commission may not submit a charter amendment any more than the voters, by initiative, may revise a charter.

Method of Electing Supervisors

The present charter calls for the election of members of the board of supervisors by district. On August 19, 1980, the voters of San Francisco will determine whether they wish instead to elect supervisors at-large. The charter commission may submit a revised charter calling for the district election of supervisors and an alternative proposition which, if approved at the same time as the revised charter is ratified, will incorporate into the revised charter an at-large scheme of electing supervisors. This scheme was approved in Horn v. Allen (1924) 195 Cal. 121. We discussed this case at length in Opinion 80-46. If the charter commission adopts this scheme, the voters will have another opportunity, in the November, 1980, election, to choose the method of supervisorial representation they prefer.

The charter commission may also include both schemes for the election of supervisors in the body of the charter revision itself and stipulate that the one in effect on a certain date shall be the one incorporated into the revised charter. This method in effect ratifies the results of the August, 1980, election rather than placing the issue once more before the voters.

We note that the charter commission has in fact chosen the second method. The charter revision, Article II, Section 2.100, provides, in relevant part:

The city attorney shall obtain a certification from the secretary of state of the State of California regarding the controlling provision in the San Francisco Charter governing the method of elections of members of the board of supervisors of the City and County of San Francisco in effect at 12:00 noon December 31, 1980; and if the method of election of members of the board of supervisors as established in the 1932 Charter as amended is solely by supervisorial districts established by geographical boundaries then the provisions contained in Article XVII Section 17.119 shall govern and the provisions of 17.120 shall be of

no force and effect and shall not be part of the revised charter of the City and County of San Francisco as approved at the general election on November 4, 1980; and if the method of election of members of the board of supervisors as established in the 1932 Charter as amended is by any other method of election then the provisions contained in Article XVII Section 17.120 shall govern and the provisions of 17.119 shall be of no force and effect and shall not be a part of the revised Charter of the City and County of San Francisco as approved at the general election held on November 4, 1980.

Thus proposed revised charter Section 7.119 sets forth a district method of election and Section 7.120 sets forth an at-large method. Whichever method is approved in August, 1980, will take effect in the revised charter.

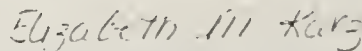
The signatures of the charter commissioners on the revised charter need not be notarized. The charter commission may not initiate amendments to the existing charter. However, the charter commission may submit an alternative proposition to that portion of the proposed revised charter which provides for the method of electing supervisors or provide within the body of the proposed revised charter itself that the method of election in effect on a certain date will be the method incorporated into the revised charter.

You are so advised.

Respectfully submitted,



Burk E. Delventhal
Deputy City Attorney



Elizabeth M. Katz
Legal Assistant

APPROVED:



GEORGE AGNOST
City Attorney
8297b
EMK/ay

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

August 18, 1980

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OPINION NO. 80-55

SUBJECT: Calculation of Service for Accumulated
Sick Leave Payment

REQUESTED BY: John J. Walsh
General Manager, Personnel
Civil Service Commission

PREPARED BY: Stephanie M. Chang
Deputy City Attorney

QUESTION PRESENTED

Whether the service requirement under Section 23.14.1 of the Civil Service Commission Rules should be based on continuous service?

CONCLUSION

Yes.

ANALYSIS

Your request for opinion states that Jacob Kahn, M.D. was employed by the City and County of San Francisco in various capacities from 1956 to January, 1971, for a total period of 8.491 years. Subsequent thereto Dr. Kahn returned to City employment in July, 1972 and remained continuously employed until October, 1979, during which time he accumulated sick leave credits. Dr. Kahn now seeks payment for the sick leave credits which he accumulated between July, 1972 and October, 1979.

You have asked whether Section 23.14.1 of the Civil Service Commission Rules requires 15 or more years of continuous service for payment of accumulated sick leave at the rate of 100%, or whether the total service (non-continuous) of 15 or more years is sufficient to entitle an employee to payment of accumulated sick leave at the rate of 100%.

Section 23.14.1 of the Civil Service Commission Rules provides that persons with 15 or more years of service at the time of their death, retirement or separation on account of industrial accident shall be paid for their accumulated sick leave at a rate of 100%. The obvious purpose of Section 23.14.1, supra, is to provide an additional benefit to career employees who have sick leave remaining to their credit when they leave City service. (See City Attorney Opinion No. 73-143.)

Pursuant to the authority vested in it by San Francisco Charter Section 8.363, the Civil Service Commission has administered the provisions of Section 23.14.1, supra, based on the continuous service of the employee. Continuous service has been administratively defined as the absence of a break in service of more than six months following resignation. (Civil Service Rules section 23.11.) Said administrative interpretation is consistent with the above-stated purpose of providing an additional benefit to career employees, i.e. persons who have remained in continuous City service.

The Civil Service interpretation of requiring 15 or more years of continuous service is consistent with Section 23.11 of the Civil Service Commission Rules which states in relevant part:

"If there is a break in service of more than six (6) months following resignation, prior sick leave credits shall be lost. Employees must start anew to earn sick leave with pay credits."

If payment is sought for accumulated sick leave credits earned subsequent to a break in service of more than six months following resignation, it is only consistent that the rate of compensation for said accumulated sick leave credits be calculated in accordance with the length of time served subsequent to said break in service. In other words, if Dr. Kahn accumulated the sick leave credits for which he seeks payment during the period of July 1972 through October 1979, it is consistent that the rate of compensation under Section 23.14.1 of the Civil Service Commission Rules be calculated in accordance with that same period of time of July, 1972 through October, 1979.

The Civil Service Commission interpretation that Section 23.14.1 of the Civil Service Commission Rules, supra, requires continuous service is also consistent with the method of computing vacation benefits for employees. Section 8.440(a) of the San Francisco Charter is explicit in basing the computation of vacation benefits on the length of an employee's continuous service.

August 18, 1980

You are therefore advised that the rate of payment for accumulated sick leave credits under Section 23.14.1 of the Civil Service Commission Rules, supra, must be properly based on the length of the employee's continuous service.

Very truly yours,

GEORGE AGNOST
City Attorney

By Stephanie M. Chang
STEPHANIE M. CHANG
Deputy City Attorney

Approved:

City Attorney

SMC:alb

8155b

CITY AND COUNTY OF SAN FRANCISCO

80-56

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

September 8, 1980

DOCUMENTS SECTION

OPINION NO. 80-56

SEP 11 1980

SALES & MARKETING
ELECTRONIC

SUBJECT: Charter Sec. 8.595(c); Abandonment and
Discontinuance of Transit Lines,
In whole or Part

REQUESTED BY: Supervisor Edward Lawson
Chair, Streets and Transportation Committee

PREPARED BY: McMorris M. Dow
Utilities General Counsel

QUESTION PRESENTED

Has the recommendation of the Public Utilities Commission in effect since May 7, 1979, to abandon or discontinue service on all or any part of specific transit lines expired?

CONCLUSION

The recommendation continues in force, and may be acted on by the Commission at any time.

ANALYSIS

Charter Section 3.595(c) reads:

"In the event of the unification, consolidation or merger of the San Francisco Municipal Railway with any privately owned street railway system or with any portion or facility thereof, no line of street railway, bus line, trolley bus line or cable car line, or any portion thereof, which is now or will be owned by the City and County of San Francisco and is now or will be operated by the agency responsible for public transit, shall be abandoned nor shall the service be discontinued thereon except upon recommendation by such agency in writing, to the board of supervisors. The

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Edward Lawson

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September 8, 1980

recommendation of such agency shall be acted upon by the board of supervisors within thirty days from the receipt thereof. For the purpose of hearing such recommendation a public hearing shall be held. If the said recommendation is disapproved by at least nine votes it shall not become effective and such services shall be continued. If said recommendation is not disapproved by nine votes of said board the recommendation shall become effective forthwith. Failure of the board of supervisors to act on said recommendation within thirty days shall be deemed as the approval of said recommendation provided that the agency responsible for public transit may without reference or recommendation to the board of supervisors abandon or discontinue service on any line of street railway, bus line, trolley bus line, or cable car line, or any portion thereof, which has been in operation for less than one year next immediately preceding such order of abandonment or discontinuance."

Your question relates to a particular proceeding which took place more than one year ago when the board refused adoption of a resolution disapproving a partial discontinuance of service on May 7, 1979, thus the commission recommendation became effective on that date.

Once the commission has recommended abandonment or discontinuance of service on all or a part of a transit line to the board, and the board, following a public hearing of such recommendation, fails to override the recommendation by at least nine votes, the charter provides that the recommendation "shall become effective forthwith."

The commission has charge of the construction, management, supervision, maintenance, extension, operation and control of the Municipal Railway (Charter Sections 3.591, 3.592). While section 3.595(c) states that the recommendation to abandon or discontinue becomes effective "forthwith", thus authorizing immediate action on the recommendation by the commission, the section is silent on when the commission must

actually put the recommendation into effect. Where no time limit is specified for the doing of an act it may be done within a reasonable time. What is a reasonable time is dependent upon the surrounding circumstances (Beck v. Piatt (1972) 24 C.A.3d 611).

The surrounding circumstances in the instant proceeding include the adoption of a five-year plan to realign transit service generally along a grid pattern throughout the City rather than on a radial pattern to and from the downtown area. The changes embodied in the five-year plan are substantial. Under the direction of the commission the changes must be and have been carefully dovetailed so as not to disrupt service while trying to improve it, and with the end in view of serving more patrons without an increase in the number of vehicles operated and the number of operators employed. The recommendation of the commission which the board refused to disapprove on May 7, 1979, was necessary to the implementation of Phase I of the five-year plan. Subsequently, certain of these changes were put into effect as Phase I-A, and the immediate plan is to put the balance of the Phase I changes into effect on September 10, 1980. Changes under the five-year plan are dependent upon other changes and factors, for example, institution of partial or full LRV service, the availability of equipment, the availability of trained operators, the necessity of complying with the Memorandum of Understanding with the operators' union, the necessity of a reasonable period of observation of how the changes in Phase I-A have worked in practice, and the necessity of integrating changes in routes and scheduling with the institution of the fall school scheduling. These changes and factors strongly support a conclusion that a reasonable time has not been exceeded in the inauguration of complete Phase I changes, particularly when viewed in the light of the fact that the entire system change over is planned to be accomplished over a five-year period, over three of which still remain. Further, there isn't the slightest evidence that the five-year plan has itself been abandoned, or of public complaints that its implementation has been unduly delayed.

It has been suggested that the proviso in section 3.595(c) that the commission without reference to the board may abandon or discontinue service on any line which has been in operation for less than one year next immediately preceding the commission's order of abandonment, represents a limit to

Edward Lawson

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September 8, 1980

the period of time a recommendation of abandonment approved by the board may be acted upon. The language of the proviso is the best answer to that contention. It is limited to lines which have " . . . been in operation for less than one year next immediately preceding such order of abandonment or discontinuance." The lines in question here have all been in operation for a number of years and did not become lines operating for less than one year simply because the recommendation of their partial abandonment or discontinuance of service occurred more than one year ago.

In view of the provisions of charter section 3.591, the commission's power over the lines of the Municipal Railway are not diminished by a recommendation to abandon. The board, having failed to overturn a recommendation of abandonment or partial discontinuance of service, has simply removed a limitation on the power of the commission to abandon a portion of particular lines.

Given commission's powers over operation of the Municipal Railway (Charter Sec. 3.591, supra), the proper course for anyone believing that a given abandonment or discontinuance or change in service is not in the best interests of the City, or of the present and potential patrons of the Municipal Railway, is to bring the problem before the commission, which has adequate authority to hear and decide and to implement any change which it believes is justified. Assuming appropriation of sufficient funds to operate the Municipal Railway, the commission is empowered to increase service on existing lines and to provide new lines.

You are so advised.

Very truly yours,

By Mc Morris M. Dow
MCMORRIS M. DOW
Utilities General Counsel

Approved by:

George Agnost
GEORGE AGNOST
City Attorney

MMD:mg
0005B

George Agnost,
City Attorney

September 12, 1980

80-57

OPINION NO. 80-57

SUBJECT: Time Limits Governing Submission of Initiative
Charter Amendments

REQUESTED BY: Quentin L. Kopp
Board of Supervisors
Jay Patterson
Registrar of Voters

DOCUMENTS DEPT.

SEP 16 1980

PREPARED BY: Burk E. Delventhal
Diane L. Hermann
Alice Suet Yee Barkley
Deputy City Attorneys

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QUESTIONS PRESENTED

1. May the voters, by charter amendment, restore the term of office of an elected official which has lapsed by operation of law?
2. May the Board of Supervisors refuse to submit a properly qualified initiative charter amendment because of the possibility that the initiative is substantively illegal?
3. In view of the text of the proposed initiative, providing in part for the restoration of the terms of incumbent district supervisors, must the Board of Supervisors submit the initiative to the voters before any specific date?
4. May the Board of Supervisors submit the proposed charter amendments to the voters at the statewide general election to be held on November 4, 1980, notwithstanding the failure of proponents of that initiative to file it with the clerk of the Board of Supervisors not less than 90 days prior to the statewide general election as specified in Government Code Section 34460?

CONCLUSIONS

1. Yes.
2. No.
3. The initiative proposition must be submitted to the voters sufficiently in advance of December 31, 1980, to insure that the election results can be finally filed with and accepted by the Secretary of State (thereby "taking effect")

no later than December 31, 1980, in order to avoid frustrating the substantial purpose of the initiative.

4. Yes.

FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 1980, the electors of the City and County of San Francisco approved an initiative charter amendment which replaces the present system of electing members of the Board of Supervisors by district with an at-large system. By virtue of that amendment, at-large supervisors will be elected at the general election on November 4, 1980. They will take office at 12:00 o'clock noon on January 8, 1981. The terms of the incumbent members of the Board of Supervisors will terminate at noon on January 8, 1981. Also on November 4, 1980, a proposed new charter will be submitted to the voters. That proposed new charter, if approved, would adopt whatever system of electing supervisors is in effect on December 31, 1980. On September 4, 1980, another initiative petition was filed with the Registrar of Voters by the proponents of the district system. This new petition, if approved by the voters, will in effect restore not only the district system of electing supervisors, but will also restore the terms of the incumbent supervisors as if the intervening special election of August 19, 1980, had never taken place.

On Monday, September 8, 1980, the Registrar of Voters completed the verification process, determined that the petition contained the requisite number of signatures and certified that verification and determination to the Board of Supervisors in compliance with Government Code §34460.

The subject initiative amendment proposes to repeal the at-large system for electing supervisors approved at the special election held on August 19, 1980, and to restore the district system. The amendment also proposes to continue the tenure of incumbent district supervisors which, by virtue of the terms of §9.100 of the San Francisco Charter as amended on August 19, 1980, would have expired on January 8, 1981.

Your inquiries regarding this initiative raised the fourth question stated above, relating to the 90-day rule. However in order to place your inquiries in proper perspective, certain related issues (questions one through three, stated above) concerning this initiative are also addressed in this opinion.

ANALYSIS

QUESTION No. 1

1. May the voters, by charter amendment, restore the term of office of an elected official?

The California Constitution, Article XI, Section 5(b) (4) provides in relevant part:

" . . . [P]lenary authority is hereby granted, subject only to the restrictions of this article, to provide therein [a city charter] or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers . . . shall be elected or appointed. . . ."

The terms "plenary" and "subject only to the restrictions of this article" in the above-quoted constitutional provision are particularly significant. No more compelling language can be found to articulate the dimension and content of the broad constitutional grant of power upon which this initiative is founded.

The word "plenary" means full, entire, complete, absolute, perfect, unqualified. Mashunkashey v. Mashunkashey (1942) 191 Okla. 501, 134 P.2d 976, 979. See also Evans v. Metropolitan Utilities District of Omaha (1971) 187 Neb. 261, 188 N.W.2d 851. The use of "plenary" is also significant in that it sets apart and distinguishes the authority to set the terms of office of the elected officials in the hierarchy of powers granted by the Constitution to home rule cities and counties. In Ector v. City of Torrance (1973) 10 Cal.3d 129, 109 Cal.Rptr. 849, 514 P.2d 433, the California Supreme Court had occasion to rule on the contention that Government Code §50083, which prohibited "local agencies or districts" from imposing municipal employee residency requirements, precluded charter cities and counties from imposing such requirements on their employees. The Court noted the above quoted provisions of the Constitution and emphasized the use of the language "plenary authority is hereby granted". Id., at fn. 3. The Ector court concluded at 153,

It follows that a statute purporting to prohibit charter cities from prescribing municipal employee residence requirements in their charters would contravene that explicit constitutional authorization. We must presume

that in adopting section 50083 the Legislature intended to enact a valid statute (In re Kay [1970] 1 Cal.3d 930, 942 [83 Cal.Rptr. 686, 464 P.2d 142]), and therefore meant to limit its reach to general law cities.

The language, "subject only to the restrictions of this article", further narrows the grounds for any claim that the term of an incumbent supervisor may not be extended by the voters. Therefore, in the absence of any express prohibition in Article XI, supra, the people of San Francisco may shorten or extend a term of an elected official, may abolish the office of that official or may restore the term of office of an incumbent elected official, especially where the term restored is the very term for which that official was elected. Accord, State Ex rel. McGovern v. Board of Elections of Cuyahoga County (1970) 263 N.E. 2d 586, 24 Ohio Misc. 135, holding that a home rule charter jurisdiction may lawfully increase the term of office of an incumbent mayor from two to four years and granting an order compelling the board of electors to submit a charter amendment proposing the increase to the voters.

In view of the foregoing, you are advised that the subject charter amendment initiative seeking to restore the original term of incumbent district supervisors, and in effect extending those terms, is a lawful exercise of home rule power over municipal affairs.

QUESTION No. 2

2. May the Board of Supervisors refuse to submit a proposed initiative charter amendment because of its possible illegality?

It is settled law in this state that the duty of the registrar of Voters does not extend to determining whether an initiative measure is substantially valid. In Farley v. Healey (1967) 67 Cal. 2d 325, 431 P.2d 650, the court stated, at 327:

It must be noted at the outset that the acting registrar of voters exceeded his authority in undertaking to determine whether the proposed initiative was within the power of the electorate to adopt. Under section 180 of the Charter of the City and County of San Francisco, his duty is

limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. It is not his function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that only a court can determine. The right to propose initiative measures cannot properly be impeded by a decision of a ministerial officer, even if supported by the advice of the city attorney, that the subject is not appropriate for submission to the voters. Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot unless he is directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the initiative power. McFadden v. Jordan (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. (Emphasis added.)

Gayle v. Hamm (1972) 25 Cal.App.3d 250, 101 Cal.Rptr. 628, involved a proceeding in mandamus to compel the clerk of Ventura County to determine the sufficiency of signatures on an initiative petition and, if sufficient, to place the proposed initiative on the ballot. The initiative petition sought an ordinance limiting the county authority to own, lease, maintain or operate an airport. The trial court issued the writ of mandamus but refused to determine the validity of the proposed measure. The Court of Appeal affirmed, stating, at 255-258, .

[T]he court will not interfere with the reserved right of the people to propose legislation absent a "compelling showing," i.e., a showing that it is "clear beyond question" that the proposed ordinance would be invalid if enacted. (Emphasis added.)

* * * * *

. . . Even grave doubts as to the constitutionality of an initiative measure do not compel a court to determine its validity prior to its submission to the electorate. [Citations omitted.]

* * *

A premature interposition of the judiciary constitutes an unwarranted limitation upon this reserve power. To accept the position espoused by defendants in this case, namely, that the court must determine the validity of the initiative ordinance at the processing juncture represented by this case and the showing made by defendants would be tantamount, in our opinion, to requiring every proponent of an initiative measure to first seek the advisory opinion of the courts as to its validity before getting the measure to the electorate. In our view, the court should shortcut the normal initiative procedure only where the invalidity of the proposed measure is clear beyond a doubt."

In light of the above-quoted case authority, it is clear that the duty of the Registrar of Voters and the Board of Supervisors in accepting for filing, processing, verifying and submitting a duly qualified initiative charter amendment is ministerial in nature. Blotter v. Farrell (1954) 42 Cal.2d 804, 812-813, 270 P.2d 481. In view of the fact that no compelling showing can be made that the proposed initiative, if adopted, would be invalid, the Board of Supervisors has a duty to submit it to the voters of the City and County of San Francisco.

QUESTION No. 3

3. In view of the text of the proposed initiative, providing in part for the restoration of the terms of incumbent district supervisors, must the Board of Supervisors submit the initiative before any specific date?

State Constitution, Article XI, Section 3(b) provides in relevant part that "amendment or repeal [of charters] may be proposed by initiative. . . ." Accordingly, the people of the City and County of San Francisco are empowered through the initiative process to propose amendments to their charter. California Government Code Section 34450, et seq., embodies the procedural guidelines for implementation of that power. Government Code Section 34459 provides in relevant part as follows,

. . . The charter of a city and county may be amended . . . by a petition signed by 10 percent

of the qualified electors of the city and county.
.. Such proposals shall be submitted to the electors at either a special election called for that purpose or at any general or special election. (Emphasis added.)

The initiative power is a power reserved by the people and not a right granted to them. See Ley v. Dominguez (1931) 212 Cal. 587, 299 P. 713; Blotter v. Farrell, supra. The initiative power is precious and one which the courts act to preserve to the fullest extent tenable. McFadden v. Jordan (1948) 32 Cal.2d 330, 332, 196 P.2d 787. All doubts as to the construction of initiative laws are to be resolved in favor of the exercise of initiative power. Gage v. Jordan (1944) 23 Cal.2d 794, 799, 147 P.2d 387. In view of this basic policy, the laws governing the initiative power should be afforded a liberal construction in favor of upholding the full exercise of the power. Pacific Rock and Gravel Co. v. City of Upland (1967) 67 Cal.2d 666, 433 P.2d. 476, 63 Cal.Rptr. 572; Blotter v. Farrell, supra, at 809; San Diego Building Contractor Assn. v. City Council (1974) 13 Cal.3d 205, 210, 529 P.2d 576, 118 Cal.Rptr. 146, 72 ALR 3d 973.

In Associated Home Builders v. City of Livermore (1976) 18 Cal.3d 582, 591, 135 Cal.Rptr. 41, 554 P.2d 473, the California Supreme Court liberally construed the exercise of initiative powers as follows:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" (Martin v. Smith (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" (Mervynne v. Acker, supra, 189 Cal.App.2d 558, 563). "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can

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reasonably be resolved in favor of the use of this reserve power, courts will preserve it." . .

. . .
This office, in Opinion No. 877, dated September 20, 1954, advised the Board of Supervisors that it had discretion in determining whether to call a special election for the submission of the proposed charter amendment. That opinion cited Ault v. Council of City of San Rafael (1941) 17 Cal.2d 415, 110 P.2d 379. The petition in Ault, supra, called for the city to publish the petition within 15 days after it was filed with the city clerk and to hold a special election not less than 40 days, nor more than 60 days, after such publication.

The Ault court concluded that the granting or denying of a writ of mandate is discretionary and that the writ would be granted to "protect a substantial right and only where it is shown that some damages will be suffered by the petitioners. . . ." The Ault court pointed out that if it were to grant the writ, the election could be held no earlier than April 2nd of the year in question, only some 12 days before the regularly scheduled election to be held on April 14th. That court rejected the argument that prejudice would be suffered because the initiative might be lost among the myriad of issues presented to the voters in the general election. The Court concluded that there had been no showing of any injury that would be suffered by a two-week delay in the submission of the amendment.

It is clear from a reading of these authorities that the Board of Supervisors has a duty to submit a duly qualified initiative to the voters. It is equally clear that the Board has the discretion to determine when an initiative charter amendment shall be submitted to the voters. However, that discretion may not be exercised in such a manner as to frustrate the purposes of the initiative. The laws governing the exercise of the initiative power must be construed so as to ensure its effectiveness. See Ault v. Council of City of San Rafael, supra; McClure v. Nye (1913) 22 Cal.App. 248, 133 P. 1145; and Citizens for Better Government v. Board of Supervisors, City and County of San Francisco, Superior Court No. 768-020.

Like the Registrar of Voters, the Board of Supervisors acts in a ministerial capacity and must submit a qualified initiative petition to the voters. Blotter v. Farrell, supra. In determining the date of an election, however, the

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Board exercises some discretion as long as the exercise of its discretion will not frustrate the purpose of the initiative. For the reasons fully discussed below, it is concluded that the Board of Supervisors would frustrate the purpose of the subject initiative and would therefore abuse its discretion if it refused to submit the proposed amendment at a election to be held at a date sufficiently in advance of December 31, 1980.

As a result of the special election of August 19, 1980, the citizens of the City and County of San Francisco will be electing members of the Board of Supervisors at large on November 4, 1980. Moreover, a proposed new San Francisco Charter will also be placed on the November 4, 1980, ballot.

Section 17.101 of the proposed new Charter provides that the new Charter "shall be operative, and shall supersede the charter of 1932, as recodified in 1971, and as amended, as of July 1, 1981." Hence, the 1932 Charter may still lawfully be amended, and those amendments will go into effect until superseded on July 1, 1981.

The proposed new charter also provides in Section 2.100 that the "controlling provisions in the San Francisco Charter governing the method of elections of members of the board of supervisors of the City and County of San Francisco shall be that in effect at 12:00 noon, December 31, 1980. . . ." Therefore, if the new charter is adopted and if the district system is restored subsequent to December 31, 1980, the district system will be in effect for less than six months. Such a result will not harmonize with the general intent of Section 2.100 of the proposed charter, which provides in pertinent part as follows:

In order to provide in this charter for the
method of election [of supervisors] in accordance
with the method of election most recently
approved by the voters of San Francisco. . . .
(Emphasis added.)

Unless the subject initiative is submitted to the voters before December 31, 1980, the people of the City and County of San Francisco will face a potentially unstable government in that at-large supervisors taking office on January 8, 1981, may face a substantial challenge by district supervisors who claim entitlement to their offices until July 1, 1981, when those at-large supervisors elected on November 4, 1980, take office.

4, 1980, would return to office.¹ When these factors are considered in connection with the policy of the law favoring interpretations which uphold and foster the exercise of the initiative power, only one conclusion can be reached. The Board of Supervisors must submit the proposed charter amendment sufficiently in advance of December 31, 1980, to insure that the amendment, if adopted, will take effect by that date, thereby becoming a part of the revised charter if it is adopted and insuring some degree of certainty in government for the people of the City and County of San Francisco.² The Registrar of Voters has advised this office that in order to insure that the amendment, if adopted, will take effect no later than December 31, 1980, the election must be held no later than Tuesday, December 9, 1980.

QUESTION No. 4

4. May the Board of Supervisors submit the proposed charter amendments to the voters at the statewide general election to be held on November 4, 1980, notwithstanding the failure of proponents of that initiative to file it with the clerk of the Board of Supervisors not less than 90 days prior to the statewide general election as specified in Government Code Section 34460.²

¹ Difficult legal problems are posed if the subject initiative is approved by the voters and takes effect subsequent to January 8, 1980. Whereas there is no visible legal impediment to extending, by charter amendment, the term of office of an incumbent elected official, serious questions arise if a charter amendment were to place in office a citizen who was an elected official but whose term had already expired. For example, suppose a charter amendment were approved, adopting the at-large system for electing supervisors and returning to office those persons who held office as at-large supervisors on November 2, 1976. One is reminded of the confusion in San Francisco in 1897 when two separate boards of supervisors claimed title to office. Such a circumstance can bring the machinery of government to a halt. See Morton v. Broderick (1897) 118 Cal. 474, 50 P. 644.

² Under Government Code §34463, a charter amendment approved by the voters does not take effect until accepted and filed by the Secretary of State.

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Government Code §34460 provides, in relevant part:

Petitions for the submission of any amendment or petitions for the repeal of a charter shall be filed with the governing body of the city or city and county not less than 90 days prior to a statewide general election

The instant petition was filed 61 days prior to the statewide general election to be held on November 4, 1980. The question is whether the 90-day limit in Government Code Section 34460, supra, prohibits the submission of this initiative to the voters by the Board of Supervisors at the general election held on November 4, 1980.³

The language in this section is ambiguous because it does not require the filing of the initiative petition 90 days prior to the next succeeding statewide general election but rather prior to a statewide general election. Furthermore, this section speaks of the "filing" of the initiative petition and makes no mention of the "submission" of the measure to the voters. Other sections of the Government Code set limits on the time of submission. See, for example, Government Code section 34461.

If Government Code section 34460, supra, read alone, is interpreted to mean that an initiative petition shall be filed 90 days prior to the next succeeding statewide general

In a memorandum to Supervisor John C. Molinari dated June 6, 1980, this office discussed the language of Government Code Section 34460, supra, as follows:

This section is somewhat confusing. No matter when it is filed, a petition is always filed not less than 90 days prior to some statewide general election. However, it does mean that an initiative charter amendment may not be submitted at a statewide general election unless the petition is filed at least 90 days prior to that election. For the purposes of this inquiry, that requirement is not relevant. (Emphasis added.)

The conclusion reached in that memorandum was dictum in view of the fact that the initiative measure was submitted more than 90 days prior to the November 4, 1980, election.

election, ambiguity again arises when one reads this section in conjunction with the accompanying provisions §§34459 and 34461, of the Government Code adopted to implement the constitutionally derived power of citizens in chartered cities and counties to initiate charter amendments by petition.

Central to this scheme of laws is Government Code §34459 which provides in relevant part,

The charter of a city and county may be amended . . . by proposals submitted by the government body or by a petition signed by 10 percent of the qualified electors of the city and county . . . or both. Such proposals shall be submitted to the electors at either a special election called for that purpose or at any general or special election. (Emphasis added.)

It is evident that both the people and the Board of Supervisors may initiate charter amendments which may be submitted at ". . . either a special election called for that purpose or at any general or special election." (Emphasis added.) This section makes no distinction between the powers of the people and the powers of the governing body to submit charter amendments. Government Code Section 34459, supra, contains no limitation on the submission of an initiative petition. The provisions of Government Code Section 34459, supra, make it clear that charter amendments whether emanating from an initiative petition or the governing body may be submitted at any time. If Section 34460 were interpreted to prohibit the submission of the subject initiative petition in the November 4, 1980 statewide general election because the election was to be held less than 90 days after the date of filing with the governing body, the governing body may nevertheless, pursuant to the provisions of §34459, submit the amendment to the voters at a special election scheduled for November 5, 1980, there being no limitation on filings except in connection with a statewide general election. According to the advice of the registrar, such a special election will cost nearly \$500,000, whereas the submission of the proposition at the general election would involve no material, additional cost. Such a result would be absurd. In construing statutes, the courts are enjoined to adopt a construction which avoids absurd consequences: Silver v. Brown (1966) 63 Cal.2d 841, 48 Cal.Rptr. 609, 409 P.2d 689; Sacramento v. Hickman (1964) 66 Cal.2d 841, 59 Cal.Rptr. 609, 428 P.2d 593. Hence, unless this 90-day rule is deemed directory the city will be required to submit this initiative at a special election to be held no later than December 9, 1980.

In 1953 the California Attorney General grappled with these confusing provisions. Interpreting the predecessor to the 90-day rule, the Attorney General concluded that the rule, when viewed in connection with the power to submit an initiative at a special election called for that purpose or at any general or special election, was contradictory, playing no logical or necessary role in the constitutional scheme. Ops. Atty. Gen. 52-245.

To understand this 90-day provision, one must trace its genesis. The California Constitution of 1879 empowered only the Board of Supervisors to submit proposed charter amendments. Article XI, section 8 provided, in relevant part:

The charter so ratified may be amended at intervals of not less than two years, by proposals therefor submitted by legislative authority of the city, to the qualified voters thereof at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. . . . (Emphasis added.)

In 1887, Article XI, section 8 was amended to read in relevant part, as follows:

The charter so ratified may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city, or city and county, to the qualified electors thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. . . . (Emphasis added.)

In 1892, the section was amended to read in pertinent part, as follows:

The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority

of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature, as herein provided for the approval of the charter. . . . (Emphasis added.)

For the purposes of this inquiry, no further material changes were made until 1902 when the initiative power to amend the charter was first reserved to the people. As amended in the election of 1902, Article XI, section 8 read in relevant part:

The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the Legislature as herein provided for the approval of the charter. Whenever fifteen per cent of the qualified voters of the city shall petition the legislative authority thereof to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval, the legislative authority thereof must submit the same. . . . (Emphasis added.)

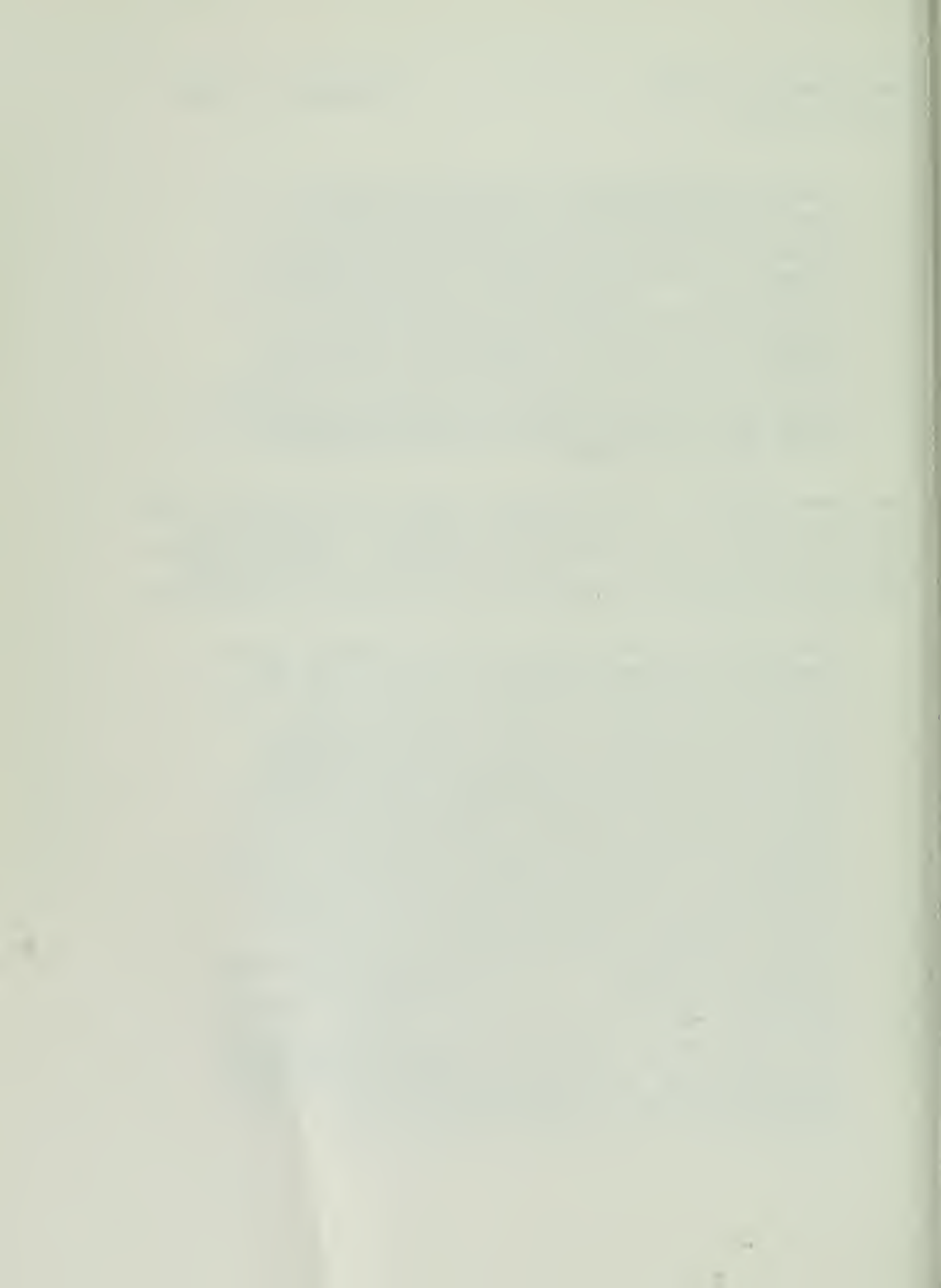
The central characteristics of the procedure for charter amendments emanating from the governing body or from initiative petition as it had evolved as of 1902 were as follows: 1) a charter amendment could only be submitted at two year intervals; 2) a charter amendment must be submitted to the voters at an election held at least 40 days after publication; and 3) legislative ratification was required. Procedural details related to initiative charter amendments were added in 1911 and changed the provisions of Article XI, section 8 to read in relevant part:

. . . Whenever a petition signed by fifteen per centum of the qualified electors of the city, computed upon the total number of votes cast therein for all candidates for governor at the

last preceding general election at which a governor was elected, is filed in the office of the city clerk of said city, petitioning the council, or other legislative body thereof, to submit any proposed amendment or amendments to the charter . . . and if signed by the requisite number of qualified electors of said city . . . said council, or other legislative body, must submit the amendment or amendments set forth in said petition to the qualified electors of said city, at a general or special municipal election, held not less than twenty, nor more than forty, days after the completion of the publication . . . (Emphasis added.)

The terms "filing" and "submission" appear for the first time in this amendment. The distinction between the terms was carried forward in all subsequent amendments and then placed in the Government Code. In 1914, California Constitution Article XI, section 8, supra, was again amended and provided in relevant part:

The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen percent of the registered electors, or both. Such proposals shall be submitted to the electors only during the six months next preceding a regular session of the legislature or thereafter and before the final adjournment of that session and at either a special election called for that purpose or at any general or special election called or at any general or special election. Petitions for the submission of any amendment shall be filed with the legislative body of the city or city and county not less than sixty days prior to the general election next preceding a regular session of the legislature. . . . The amendments so submitted shall be advertised in the same manner as herein provided for the advertisement of a proposed charter, and the election, thereon held at a date to be fixed by the legislative body of such city, not less than forty and not more than sixty days after the completion of the advertising in the official paper. . . .



Thus for the first time, the California Constitution Article XI, Section 8 set a time limitation on the submission of and on the filing of the initiative petition, to wit: the initiative petition must be filed not less than sixty days prior to the general election next preceding a regular session of the legislature and submitted to voters only during the six months next preceding a regular session of the legislature, and the holding of the election not less than forty nor more than sixty days after the completion of the advertising. One of the purposes purportedly served by the 1914 amendment as set forth in the ballot arguments was to

. . . [clear] up the present uncertainty as to the times at which a charter election may be held, permitting the cities to hold such elections at any time within six months prior to the regular session of the legislature or at any time during the regular session. As the general state election is held in all cities in November prior to the meeting of the legislature, this will enable the cities to hold their charter election at the same time without additional expense.

Subsequent amendments to this constitutional provision and changes in the length of the term of the California legislative session render the above-quoted intent meaningless. As for the 60-day limitation for filing, the only rational explanation for this limitation was to provide the administrative officials with sufficient time to complete verification of signatures so that the text of the initiative may be published in sufficient time to insure that an election may be held not less than forty nor more than sixty days thereafter, and also prior to the end of the next regular session of the legislature.

In the election of November 4, 1930, crucial changes were made. Up to that time charter amendments could be submitted to the voters whether emanating from the legislative body or by initiative petition only during the six months next preceding the regular session of the legislature and had to be filed not less than sixty days prior to the election next preceding a regular session of the legislature. In the 1930 election, the following amendment to Article XI, section 8 was approved by the voters of the State of California:

The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body of the city on its own motion or

on petition signed by fifteen per cent of the registered electors, or both. Such proposals shall be submitted to the electors . . . at either a special election called for that purpose or at any general or special election. Petitions for the submission of any amendment shall be filed with the legislative body of the city or city and county not less than sixty days prior to the election The amendments so submitted shall be advertised in the same manner as herein provided for the advertisement of a proposed charter, and the election thereon, held at a date to be fixed by the legislative body of such city, not less than forty nor more than sixty days after the completion of the advertising in the official paper. . . . (Emphasis added.)

Those changes were discussed by their proponents in the 1930 election voters' pamphlet as follows:

Argument in Favor of Senate Constitutional Amendment No. 8.

The purpose of this proposed amendment is twofold.

First. Under existing provisions of Section 8, Article XI of the constitution, proposed amendments to city charters must be submitted to the electors during the six months' period prior to the opening of the legislature and its final adjournment. The amendment strikes out the words "only during the six months preceding a regular session of the legislature or thereafter and before final adjournment of that session" so as to permit people of cities to vote on charter amendments whenever they desire. In nearly all the cities regular municipal elections are held in the spring and more than six months before the legislature opens, wherefore proposed charter amendments can not be submitted thereat, but must be deferred to a special election to be called in the fall, which means additional expense and inconvenience, without serving any good purpose. (Emphasis added.)

Second. Under other existing provisions of the section, petitions for the submission of charter amendments must be filed not less than sixty days prior to the general election, which

precedes the opening of the legislature. There is no good reason why the people should not be permitted to submit such petitions at a later date if they so desire. A city council may propose charter amendments upon their own initiative at any time. Why not give the people the same right? The proposed amendment would strike out the words "general" and "next preceding a regular session of the legislature," so as to permit the people to file petitions for charter amendments at any time. (Emphasis added.)

In brief, the proposed changes would allow the submission of charter amendments to the electors at any regular or special election whether proposed by the people or the city council. The amendment removes unreasonable restrictions and is in the interest of economy; therefore it should be adopted. (Emphasis added.)

A number of civic organizations in California representing many municipalities are heartily in accord with the provisions of the proposed amendment. It passed both houses of the Legislature without opposition.

This above-quoted ballot argument reflected a trend to liberalize procedures for the adoption of charter amendments and to equalize the power of the people with that of the governing body to submit initiative charter amendments, a view which is consistent with the court decisions of this state.

In 1932, this section was again amended to restore the sixty day limitation on the filing of a charter amendment. The relevant portion of Article XI read exactly the same as the text prior to 1930 in that

petitions for the submission of any amendment shall be filed with the legislative body of a city and county not less than sixty days prior to the general election next preceding a regular session of the legislature.

Explaining this addition, Professor Van Alstyne has written,

Although the three changes [not relevant here] above indicated were the only ones referred to by the arguments in the ballot pamphlet, the

amendment actually incorporated . . . other changes in Section 8, presumably (since not mentioned in the pamphlet) without the explicit knowledge of many voters: . . . It repealed the second of the procedural changes previously adopted in 1930, thereby restoring the pre-1930 requirement that petitions for charter amendments be presented not less than sixty days before the general election preceding a regular legislative session.

* * *

These apparently inadvertent changes introduced by the 1932 amendment, considered in the light of the ballot arguments, tend to suggest that the draftsman of this amendment to an already much-amended section had, by error, simply failed to employ an up-to-date version of Section 8 as his basic form. Subsequently, an attempt to restore the language of the 1930 and 1922 amendments was made in 1948. This attempt failed, apparently for the reason, pointed out by the opposition argument in the ballot pamphlet and conceded by its proponents, that the draftsmen of the measure, while seeking to "correct" the charter adoption procedure, had "inadvertently included" certain "conflicting provisions" which seriously clouded its meaning. Arguments to Voters, Election of November 2, 1948, Proposition 11 (A.C.A. no. 18). (Emphasis added.)

Van Alstyne, "California Constitutional Revision Commission Background Study Relating to Article XI Local Government," pp. 226-227. In view of Professor Van Alstyne's comment, the 1930 amendment which deleted the words "next preceding a regular session of the legislature" and their rationale become more significant. The anomaly in the requirement that the initiative petition be filed not less than 60 days prior to a statewide general election next preceding a regular session of the legislature was carried forward in all subsequent amendments to Article XI, Section 8. Even as late as 1970, Article XI section 8 continued to read substantially the same as in 1932.

On June 2, 1970, the California voters repealed Article XI, section 8 of the California Constitution, supra. The



prolix treatment of the charter amendment process was simplified and set down in Article XI, Section 3(b) which now provides,

The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

At the same time the California legislature added Chapter 3 to the Government Code, Sections 34450 et seq., which became operative upon the adoption by the people of the constitutional amendment. See Statutes 1969, Chapter 1264, p.2475, Section 2, embodying the procedural details formerly contained in the Constitution. In 1972, the 60-day limit was replaced by a 90-day limit. Government Code Section 34459 now provides in relevant part as follows:

. . . Such proposals [amending or repealing the charter of a city and county] shall be submitted to the electors at either a special election called for that purpose or at any general or special election.

Government Code Section 34460 now provides in pertinent part as follows:

Petitions for the submission of any amendment or petitions for the repeal of a charter shall be filed with the governing body of the city or city and county not less than 90 days prior to a statewide general election and not more than one year after the date of the first signature affixed thereon. . . .

As set forth above. the Board of Supervisors has a duty to submit the subject initiative at an election held sufficiently in advance of December 31, 1980, so as to insure that the amendment if approved will take effect on that date. The question presented here is whether the 90 day limitation in Section 34460 limits the power of the Board of Supervisors to submit to the voters a duly qualified initiative which has been properly advertised at an election held within the 40-60



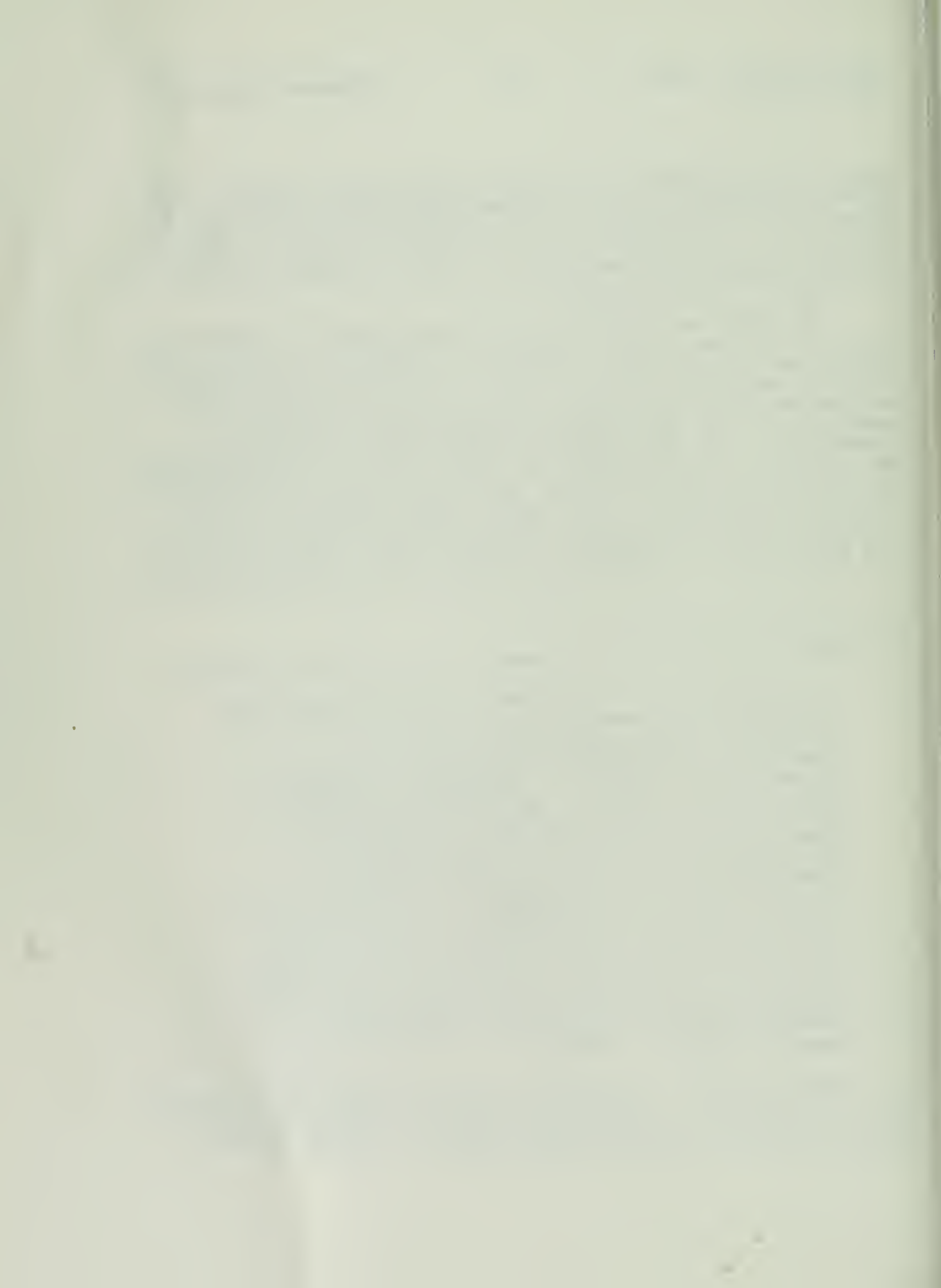
day limits specified in Government Code Section 34461.⁴ The 90-day limitation may not be read as preventing the Board of Supervisors from exercising its discretion to call a special election for the consideration of charter amendments and to consolidate that special election with the general election to be held on November 4, 1980.

To hold that the 90-day limit precludes the submission of an initiative charter amendment on November 4, 1980, would lead to an absurd result. As noted above, this issue must be resolved before December 31, 1980. The Registrar of Voters has advised that he is able to comply with all time limit requirements for advertising and holding an election on November 4, 1980, for the subject initiative. If the proposal is not submitted on November 4, 1980, it must be resubmitted at a special election held no later than December 9, 1980. As fully discussed above, the 90-day filing limitation is only intended to provide officials with sufficient time to process the petitions. The section literally read provides that the petition shall be filed 90 days prior to "a statewide general

⁴ Section 34461 of the Government Code provides as follows:

If the petitions have a sufficient number of signatures the governing body of the city or city and county shall submit the amendment or amendments proposed or the proposal for charter repeal to the electors. Amendments proposed by the governing body and amendments proposed by petition of the electors may be submitted at the same election. The amendments so submitted or the proposal for charter repeal shall be advertised in the same manner as provided for the advertisement of a proposed or revised charter . . . The election on the proposed amendments or the proposal for charter repeal shall be held at a date to be fixed by the governing body of the city or city and county, which is not less than 40, and not more than 60, days after the completion of the advertising in the official paper. (Emphasis added.)

Advertisement is governed by Section 34455 and requires the publication of a proposed amendment at least once in the official newspaper of said city or county at each edition thereof during the day of publication.



election." The petition is always filed 90 days prior to some statewide general election. Therefor the 90 day limit, by its literal terms, would not preclude the submission of the initiative charter amendment on November 5th. This conclusion conflicts with the underlying purpose of the 1930 amendment, discussed above, to avoid "additional expense and inconvenience without serving any good purpose" and would subvert the basic purpose of the 1930 amendment, to remove ". . . unreasonable restrictions and [promote] the interest of economy. . ." See Argument in Support of Senate Constitutional Amendment No. 8, supra.

Moreover, the language of the 90 day limit relates to the filing of the petition and does not mention the submission of a charter amendment or the holding of the election. Specific limits regarding the time of submission of initiative charter amendments are set forth in Government Code Section 34461.

In view of the specific provision of §34459 that a proposed charter amendment initiated by petition may be submitted at a special election called for that purpose or at any general or special election, and in view of the specific mandate of Section 34461 that an election be held not less than 40 nor more than 60 days after the completion of advertising, it must be concluded that the 90 day limit on filing of the petition has no bearing on the power to submit the petition to the voters or on the time of the holding of the election.

The public objectives underlying the 40-60 day limitation of Section 34461 and the advertising provisions of Section 34455 are that the public be notified and given adequate time to study a charter amendment proposal before the election and that the proponants be assured that an election will be held before the proposal has become stale. Accordingly, one cannot attribute to the 90-day limit any legislative intent to secure time for debate and discussion on a charter amendment issue.

The 90 day rule by its terms only applies to the filing of initiative petitions and not to amendments emanating from the governing body. No reasonable difference can be apprehended between the time needed for discussion and debate on a charter amendment submitted by the governing body and one initiated by initiative petition. The circulation of a petition and the gathering of the required number of signatures necessarily generate interest and stimulate

preparation in the community over a relatively long period; whereas a Board of Supervisors' proposal may be submitted at any time and without much advance debate in the community. See Government Code Section 34455.

An obvious contradiction exists between the purpose behind the 1930 amendment to Article XI, Section 8 of the California Constitution to promote fuller exercise of the initiative power and an interpretation of the 90-day rule which would impose a jurisdictional limit on the power of submission of an initiative petition to the voters. The 1930 amendment to the Constitution purported to reserve to the people the same power to initiate charter amendments by petition that theretofore had been reserved to local governing bodies. By its terms that amendment was intended to empower the Board of Supervisors and the people to initiate a charter amendment at any time. In view of the basic policy favoring the exercise of initiative powers and the rule of construction employed by the California courts to resolve all doubt and ambiguity in favor of the full exercise of the initiative power, the elevation of the 90 day requirement on the filing of an initiative petition to the status of a jurisdictional limitation on the power of the Board of Supervisors to submit that petition to the voters makes no sense. It must be concluded that a duly qualified initiative charter amendment which has been properly advertised can be submitted to the electorate notwithstanding that it was filed less than 90 days prior to the election.

The California Attorney General concluded in 1953 that

. . . [T]he sixty-day clause of Article XI, section 8, is a direction regarding the time for an election on the proposal, rather than a restriction on the filing. . . . It does not prevent the petition from being filed at any time. Consequently, the occurrence of the sixtieth day preceding the general election neither cuts off the petition's circulation nor destroys its potential eligibility for the ballot. [21 Ops. A.G. 52-56.]

That this 90-day limit is merely directory and not mandatory is supported by well established principles of statutory construction. A statute which is merely a guide for the conduct of business or for the orderly processing of the public's affairs should be construed as directory rather than



as a limitation on powers. French v. Edwards (1872) 13 Wall (80 U.S.) 506, 20 L.Ed. 702. The only rational purpose for the 90 day rule is to secure sufficient time for election officials to complete the verification process. When a time limit is designed to subserve some public purpose, the court will choose the directory or mandatory construction according to which will best serve that public purpose. Calaveras County v. Brockway (1866) 30 Cal. 325, 343.

Time limitations are often held to be directory. Shaw v. Randall (1860) 15 Cal. 384; Tuohy v. Chase (1866) 30 Cal. 524; Pulcifer v. County of Alameda (1946) 29 Cal.2d 258, 175 P.2d 1. Whether a time limit is mandatory or directory depends on a review of the whole statutory scheme and a consideration of the consequences of failure to adhere to the time requirement. Where time limits pertain to the duties of public officers those limits are prescribed for the convenience of those officers and the time limits are directory rather than mandatory unless the legislature has clearly manifested a contrary intent, as when it imposes a sanction for failure to comply. Pulcifer v. County of Alameda, *supra*; People ex. rel. Jacobs v. Murray (1860) 15 Cal. 221; Touhy v. Chase, *supra*; Buswell v. Board of Supervisors (1897) 116 Cal. 351, 48 P.226. See also Edwards v. Steele (1979) 25 Cal.3d 406.

This requirement may have made more sense when legislative ratification of charter amendments was required, when legislative sessions were short and the statewide general election always preceded the opening of the session. None of these considerations is present today. In the instant case, all the provisions in Government Code Sections 34450 et seq. serve the basic purpose of implementing the people's reserved initiative power to amend their charter. A construction that the 90 day limitation is directory will promote, serve and effectuate rather than defeat the exercise of that basic power. Conversely, a conclusion that this limitation is mandatory would elevate form over substance and technicality over meaning.

An important guide setting out the line of demarcation between mandatory and directory language is whether it is framed in affirmative or prohibitory terms. In the instant case, Government Code Section 34460 says the petition "shall be filed . . ." Since this language is not framed in prohibitory terms it therefore should be given a directory interpretation. Bladen v. Philadelphia (1869) 60 PA 464, 466; Winslow v. Zoning Board of City of Stanford (1956) 143 Conn.

381, 122 A.2d. 789. In any case, the language of a statute will be construed as directory insofar as the failure to comply therewith does not prejudice any rights protected by the statute or frustrate any basic legislative purpose. Morris v. County of Marin (1977) 18 Cal.3d 901, 908; see also State ex rel. Werlein v. Elamore (1967) 33 Wis.2d 288, 147 N.W.2d 252 (1967). A conclusion that the 90-day limit is mandatory and thus jurisdictional would clearly frustrate the initiative process.

Furthermore, courts often look to the statute to determine whether the legislature has made provision for sanctions for the failure to comply with the requirements in question. The absence of a sanction is often marshalled in support of the conclusion that the legislature did not intend that the time limit be mandatory. Claremont v. Taxpayers Assn. v City of Claremont (1963) 223 Cal.App.2d 589; 35 Cal.Rptr. 907. No sanction exists if the 90-day limitation is not observed.

And though the word "shall" as used in Section 34460 is generally mandatory (Thomas v. Driscoll [1940] 42 Cal.App.2d 23, 108 P.2d 43), whether it in fact is mandatory depends upon the legislative intent (People v. Superior Court [1970] 3 Cal.App.3d 476, 83 Cal.Rptr.771). In the final analysis, the word "shall" is held to be directory rather than mandatory if no public purpose is served in holding the language mandatory (Governing Board v. Felt [1976] 55 Cal.App.3d 156, 127 Cal.Rptr. 381); in this case no useful purpose can be discerned for the conclusion that the 90 day limit is mandatory. In view of the fact that the rule only serves the convenience of the election officials and does not promote matters of substance, the language must be construed as directory. Francis v. Superior Court of Los Angeles (1935) 3 Cal.2d 19, 43 P.2d 300.

Until 1975, initiative charter amendments had to be ratified by the legislature. See former Section 34463 of the Government Code added by the Statutes of 1969, Chapter 1264, page 2477, section 3, requiring the Legislature to approve city charters before filing with the Secretary of State. This requirement, long recognized as a mere formality, was finally repealed by the Statutes of 1975, Chapter 238, page 627, section 13. See Harrison v. Roberts (1904) 145 Cal. 173, 1978; see also California Constitution Revision Commission, supra, at 231. That repeal is now embodied in Section 34463. Charter amendments now take effect following ratification when

accepted and filed by the Secretary of State. See Government Code Sections 34463 through 34465. Legislative ratification is no longer required. Whereas a 90 day rule may have had some utility in an era when legislative ratification was required and legislatures did not sit full time, today it must be deemed to serve only the convenience of the election officials to insure that they have adequate time to process signatures.

As can be concluded from an analysis of the constitutional provisions and their successor provisions in the Government Code, all these sections are designed to implement the power of direct legislation of the people. No reasonable ground can be found for the conclusion that the 90 day rule is mandatory and jurisdictional and therefore acts as an limitation on the people's power of direct legislation.

A conclusion that the Board may not exercise its discretion to submit an initiative emanating from a petition of the electors at a statewide general election when that petition has not been filed with the governing body more than 90 days prior that election, whereas the Board may exercise its discretion to submit the very same initiative on its own, leads to an absurd conclusion and violates the basic tenet of statutory construction that statutes must be given a reasonable, common sense construction (Great Western Distillery Products, Inc. v. John A. Wathen Distillery [1937] 10 Cal.2d 442, 74 P.2d 745; Rose v. State [1942] 19 Cal.2d 713) which is practical rather than technical (City of Costa Mesa v. McKenzie [1973] 30 Cal.App.3d 763, 106 Cal.Rptr. 569; The People v. Hacker Emporium Inc. [1971] 15 Cal.App.3d 474, 93 Cal.Rptr. 132); which leads to a wise policy rather than to mischief and absurdity (Re Application of Davis [1936] 18 Cal.App.2d 291, 63 P.2d 853; Unemployment Reserves Commission v. St. Francis Homes Assn. [1943] 58 Cal.App.2d 271, 137 P.2d 64); and which leads to a workable and reasonable result (Regents of the University of California v. Superior Court of Los Angeles [1970] 3 Cal.3d 529, 91 Cal.Rptr. 57). Accordingly, when faced with two conflicting constructions a court, in interpreting a statute, should choose that one which leads to the more reasonable result. Metropolitan Water District v. Adams (1948) 32 Cal.2d 620, 197 P.2d 543. As the basic purpose of the Government Code provisions relating to the submission of initiatives is to implement the people's reserved right to initiative powers, the full effective exercise of this initiative power should not be sacrificed to a literal interpretation of the law. Select Base Materials

Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 335 P.2d 672; Shonfeld v. City of Vallejo (1975) 50 Cal.App.3d 401, 123 Cal.Rptr. 669.

Finally this conclusion harmonizes with the basic principle governing initiative powers set forth above. All doubts must be resolved in favor of upholding rather than defeating or curtailing the exercise of the initiative power. The conclusion that the 90 day limit is directory rather than mandatory affords the broadest initiative power to the people without violating any countervailing public policies.

SUMMARY OF CONCLUSIONS

1. Under the California Constitution, Article XI, Section 5, the people of a chartered city and county are given plenary authority to provide in their charter or by amendment thereto for the manner in which and the terms for which municipal officers are to be elected. Under this power, the people in a chartered city and county may restore to incumbent elected officials the original terms for which they have been elected but which have been truncated by intervening charter amendments.

2. Neither the Board of Supervisors nor the Registrar of Voters, even when acting on the advice of counsel, may refuse to submit to the voters a properly qualified initiative on the grounds of its possible illegality.

3. In view of the text of the proposed revised charter incorporating that system for election of supervisors in effect on December 31, 1980, (see proposed Charter Section 2.100) the initiative proposition must be submitted to the voters sufficiently in advance of December 31, 1980, to insure that the election results can be finally filed with and accepted by the Secretary of State (thereby "taking effect") no later than December 31, 1980, in order to avoid frustrating the substantial purpose of the initiative.

4. An initiative petition for a charter amendment may be filed at any time since the 90-day limitation on the filing must be deemed directory only. Therefore, the 90 day limitation as provided for in Elections Code §34460 has no bearing on the power of the Board of Supervisors to submit the initiative to the voters at the statewide general election. The failure to file the petition within the time period specified in Elections Code Section 34460 does not invalidate

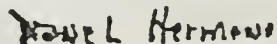
September 12, 1980

either the filing or the subsequent action taken to submit the initiative to the voters.

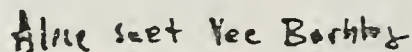
Very truly yours,



BURK E. DELVENTHAL
Deputy City Attorney

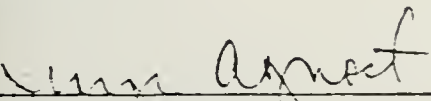


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APPROVED:



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City Attorney

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80-58

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

September 19, 1980

OPINION NO. 80- 58

SUBJECT: Fire Protection System Improvement
Bonds, 1977; Expenditure Of Funds
For Repair Of Existing Fireboat
Rather Than Purchase

REQUESTED BY: ANDREW C. CASPER
Chief of Department
San Francisco Fire Department

DOCUMENTS DEPT.

SEP 28 1980

PREPARED BY: ROBERT A. KENEALEY
Assistant Chief
Deputy City Attorney

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QUESTION PRESENTED

May proceeds from City and County of San Francisco Fire Protection System Improvement Bonds, 1977, be expended to improve the present fireboat instead of purchasing a new fireboat when the ballot provision approved by the electorate specifically stated that "purchase of a new fireboat" was included in the purpose for which the bonds were authorized?

CONCLUSION

Yes.

ANALYSIS

The bond proceeds may be expended to improve the existing fireboat because the City and County of San Francisco (the "City") is not required to purchase a new fireboat if insufficient bond proceeds are available to do so and because the improvement of the present fireboat is an authorized alternative use of bond proceeds since such an activity is included within the general purpose for which the bonds were issued.

On November 8, 1977, a bond issue in the amount of \$6 million was approved by the electorate in the City. The ballot title of this bond issue was as follows:

"Fire Protection System Improvement Bonds, 1977.
To incur a bonded indebtedness of \$6,000,000 for the purpose of improvements of the fire protection facilities of the San Francisco Fire Department, including the purchase of a new fireboat."

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San Francisco Fire Department

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The ordinance submitting this proposition to the electorate, Ordinance No. 365-77, stated that the purpose for incurring this bonded indebtedness was:

"\$6,000,000 to pay the cost of improvements of the fire protection facilities of the San Francisco Fire Department, including the purchase of a new fireboat, and all other works, properties or structures necessary or convenient for such municipal improvement."

The San Francisco Fire Department has now been advised that the cost of construction of the boat will exceed an earlier estimate and has therefore determined that there are insufficient funds available for the purchase of a new fireboat. The Department now proposes to modify and improve the present fireboat and has requested an opinion as to whether this is a permissible use of bond proceeds.

Proceeds of a bond issue may be expended only for the purpose authorized by the voters in approving the issue of the bonds. Mills v. San Francisco Bay Area Rapid Transit District (1968) 261 Cal.App.2d 666, 68 Cal.Rptr. 317; O'Farrell v. County of Sonoma (1922) 189 Cal. 343, 208 P. 117. This limitation may be deemed to be contractual or of an analogous status, and the statutes and ordinances under which the public body acts in submitting the bond issue proposal to the voters must be considered with the ballot proposition in determining the extent of this restriction. Mills v. San Francisco Bay Area Rapid Transit District, supra.

The bonds in question were issued pursuant to Section 43600, et seq., of the Government Code, as authorized by Section 7.300 of the San Francisco Charter. Section 43608 of the Government Code states that the legislative body may pass an ordinance ordering the submission of the proposition of incurring a bonded debt to the electorate, and Section 43628 of the Government Code states that "the proceeds of the bonds shall be placed in the treasury to the credit of the proper improvement fund and applied exclusively to the purpose and object recited in the ordinance;" [Emphasis added]

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In the instant case, Ordinance No. 365-77, which appeared on page 84 of the Voter's Handbook, and the title of the ballot proposition described a very general municipal improvement, improvement of the fire protection system and, included within that improvement one very specific item, the purchase of the fireboat.

It is clear that without the addition of that specific item in the ordinance and ballot proposition, the rehabilitation of the existing fireboat would certainly be considered an "improvement of the fire protection system." The inclusion of this specific language, however, gives rise to two issues which, in the instant case, are intertwined. The first issue is whether the City is required to purchase a new fireboat with these bond proceeds and the second issue is whether a variation from the specific language approved by the voters is permissible under these circumstances. In discussing these issues, both California cases and cases of other jurisdictions will be reviewed.

It seems to be a generally accepted proposition that if the authorities having the power and responsibility of proposing the bond issue have not, by the forms employed in submitting the proposition to the electors, confined themselves to an absolutely definite and inflexible plan of construction and expenditure, then they should be permitted to carry on the improvements to the extent of funds available. Williams v. City of Stockton (1925) 195 Cal. 743, 756, 235 P. 986. In Williams,

" . . . the electors of the City of Stockton authorized a bond issue of \$600,000 as the estimated cost of the acquisition, construction, and completion of a new city hall, including the land, equipment, furnishings, appliances, and necessary appurtenances, for the housing of the several departments of the city and for general municipal uses. . . ." Id. at p. 745. (It is not clear from the opinion whether the above language is that of the ordinance calling the election.)

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After various construction contracts for the hall were let, an insufficient amount remained in the bond proceeds to purchase furnishings for the hall because the cost of construction had increased from original estimates. Under these circumstances, the court held that the city should be permitted to continue with the improvements to the extent of funds available. That is, the city should continue without sufficient funds to properly furnish the building, although furnishings appear to have been included in the ordinance calling the election.

The court in the Williams case referred to the fact situation in O'Farrell v. County of Sonoma, supra, as a circumstance under which a governing body was bound to a specific plan of action. The resolution calling the election in that situation authorized construction of specific roads for specific sums. The court held that since the proposition specified each road by name and length and set a definite and specific sum for each piece of road to be constructed, the county could not let a contract for the construction of a portion of one road.

If the ordinance calling the election in the Williams case did contain the words "including furnishings," then that case is quite similar to the instant one. Since a specific sum was not specified for the purchase of the new fireboat, the holding of the court in the O'Farrell case does not appear to apply to the fireboat situation.

Recent California cases do not deal with a situation where a specific improvement, set forth in the ballot proposition and the ordinance calling the election, was not constructed or completed. The case of Associated Students of North Peralta Community College v. Board of Trustees (1979) 92 Cal.App.3d 672, 155 Cal.Rptr. 250, however, is somewhat relevant to this issue. In this case, the Peralta Community College District issued bonds after receiving voter approval of a ballot proposition generally authorizing the purchase and construction of school buildings. The ballot argument and pre-election campaign indicated an intention to build four campuses but, because of lack of funds and the fact that the fourth campus would be economically and educationally ill-advised, the fourth campus was never built. The court held that the District was not required to build the fourth campus because it was not restricted by statements made in

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extrinsic documents. See also Tooker v. San Francisco Bay Area Rapid Transit District (1972) 22 Cal.App.3d 643, 99 Cal.Rptr. 361, and Mills v. San Francisco Bay Area Rapid Transit District (1968) 261 Cal.App.2d 666, 68 Cal.Rptr. 317, where the issuing body was not bound to follow specific plans set forth in extrinsic documents.

Although all of these recent cases are distinguishable from the instant one in that the new fireboat is specified in the ballot proposition and ordinance rather than just in extrinsic documents, they do indicate that California courts are willing to give bond issuers discretion in the use of bond proceeds where the general purpose of the bond issue is still fulfilled.

A holding by the Court of Appeal in Ohio does speak to the issue at hand. In Krieg v. City of Springfield, 106 N.E.2d 652 (1952), voters approved a bond issue to be expended for two separate improvements to eliminate two railroad grade crossings in the city. The specific locations of both grade crossings were set forth in the proposal approved by the voters. It was later determined that after the first grade crossing was eliminated, the balance of the proceeds derived from the bond issue would be insufficient to pay the costs for the elimination of the second grade crossing. The court held that "[I]t lies within the sound discretion of the legislative body of the City of Springfield to decide whether to proceed with one of the projects, even though there would be insufficient funds to proceed with the other project. . . . " Id. at p. 653.

The review of the foregoing authorities indicates that case law generally supports an argument that the City need not purchase a new fireboat if insufficient funds are available to do so.

The more difficult issue in the instant case is whether the fireboat can be rehabilitated with the bond proceeds when that use of the bond proceeds is definitely at variance with the proposition approved by the electorate. Very few California cases deal with the use of bond proceeds for a purpose other than that specified in the proposition submitted to the electors. In City of San Diego v. Millan (1932) 127 Cal.App. 521, voters approved the issuance of bonds for, among other things,

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the acquisition, construction and completion of a dam "of the arched, gravity section, masonry type on the San Diego River." The state engineer, however, withheld authority for the construction of that type of dam and approved the construction of a hydraulic, earth-filled rock embankment type of dam. The question considered by the court was whether or not the change in the type of dam, which was made necessary by action of the state, could be considered such a departure from the purposes for which the bonds had been authorized as to prohibit the use of bond money for such a type of dam. The court held that:

" . . . where the lawful exercise of police power of the State of California compelled the City of San Diego to change the type of dam which it proposed to build . . . the dam not being the sole purpose to be attained by the bond issue, but one of a number of means whereby its general purpose was to be obtained, and where the change in the type of dam which was to be constructed place no greater burden upon the taxpayers of the City of San Diego than that originally contemplated at the time of the election, no such breach of a contractual relation between the city and the taxpayers occurred as would justify our holding that the type of dam approved by the state officers could not be constructed and paid for with the money derived from the sale of bonds." Id. at p. 536.

This case is distinguished from the instant one in that the change in the use of bond proceeds was necessitated by the police power of the state but the court does indicate that, as long as the purpose of the bond issue is attained, the change can be made.

Flood Control District v. Wright (1931) 213 Cal. 335 is another case in which a change in the type of dam to be constructed was authorized by the court. In this case, however, the ballot proposition incorporated a statute authorizing the change and the court based its holding upon the interpretation of that statute. Other relevant California cases are those discussed earlier dealing with variation of the project from plans as set forth in extrinsic documents but not as set forth in ballot propositions.

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Cases from several other jurisdictions provide guidance in determining whether bond proceeds can be used for a purpose which varies from that authorized by the voters. In Coggins v. City of Asheville, 180 S.E.2d 149, 287 N.C. 428 (1971), the Supreme Court of North Carolina approved of a substantial variation in use of bond proceeds. In that situation, the voters had approved of one ballot proposition providing funds for the erection of an auditorium building and a second ballot proposition providing funds for the construction of a municipal civic arts center. After the elections were held, city authorities discovered that proceeds from the issues would fall short of financing the two projects and decided to merge the two projects into one combined facility. They also decided to remodel the existing city auditorium as part of the new facility. An action was brought on the ground that this use of bond proceeds constituted an unlawful diversion of funds from the project authorized. The court found, however, that construction of a combined facility, including remodeling of the existing auditorium, was necessary under the conditions to accomplish the general purpose of the bond issue and held that use of bond proceeds for this purpose did not constitute an unlawful diversion of the bond proceeds.

Another relevant case is St. Louis County v. State Highway Commission, 409 S.W.2d 149 (1966). In this case, the Supreme Court of Missouri also authorized the use of bond proceeds for a purpose different from that set forth in the ballot proposition. The ballot proposition in St. Louis County was quite similar to that in the fireboat case. The bond issue was to provide funds for:

" . . . the construction of highways within said county; said highways to include those commonly known as the Mark Twain and Daniel Boone Expressways and Ozark Expressway with Route 61 connection, and an outer belt expressway" Id. at p. 150.

After the voters had approved the ballot proposition, it became infeasible and impractical to expend money for the construction of the "outer belt expressway" because a determination had been made to construct an interstate highway on virtually the same route. The St. Louis City Council therefore proposed to use

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these bond proceeds for acquiring right-of-way for another highway, not an "expressway," which was not mentioned in the ballot proposition. The court stated:

"The word highway is first used in Proposition No. 1 broadly and without limitation except that the highways must be within the County. The Proposition then states that 'said highways' are 'to include' the expressways specifically designated therein. The meaning of the word 'include' may vary according to its context. Ordinarily it is not a word of limitation, but rather of enlargement. 42 C.J.S. Include p. 525. When used in connection with a number of specified objects, it implies that there may be others which are not mentioned. [Citations omitted]" Id. at p. 152.

The court then went on to hold that St. Louis County was not bound to construct the outer belt expressway regardless of changed circumstances. The court then discussed the use of the bond proceeds for the new highway which was not named in the ballot proposition and stated:

"We hold that the intention and purpose of Proposition No. 1 was to embrace and specify expressways as one of the kinds of highways for which the funds provided could be used; the inclusion and specific mention of certain expressway routes did not have the effect of limiting the term 'highways within said County' or convert and dedicate the proceeds of the bonds sold solely to the construction of expressways. . . . " Id. at p. 153.

The court concluded that the funds could be lawfully appropriated in payment of the costs of acquiring the right-of-way for the additional highway.

The holding of the court in St. Louis County certainly supports the contention that the Fire Protection System Improvement Bond proceeds can be used for rehabilitation of the existing fireboat.

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Several other cases deal with lesser variations in the use of bond proceeds. In Wood v. City of Birmingham, 165 So.2d 95 (1964), the Supreme Court of Alabama held that a bond issue approved by the electorate "for the purpose of improving highways in the City of Birmingham" contemplated not only improvements of existing streets but also construction of new streets.

The Supreme Court of Missouri, in Meyering v. Miller, 51 S.W.2d 65 (1932), stated that bond funds authorized "For the acquisition of land and the construction of additions to and extensions and equipment of public hospitals" could be used to erect a new hospital. Id. at p. 65. The court held that the purpose of the bond issue was not merely to increase the size and capacity of each separate unit of the present hospitals in the city but that it also contemplated the addition of separate new hospitals if and when they were determined necessary.

The use of bond proceeds for purposes which vary widely from the purposes set forth in the ballot argument has been forbidden by the courts. For example, the Supreme Court of Colorado, in McNichols v. City & County of Denver, 209 P.2d 910 (1949), held that the authority to issue bonds for improving the Denver General Hospital was not authority to issue bonds for construction of an administration building to house the Bureau of Public Welfare. The variance from the stated purpose in that case, however, is much greater than that found in the case of the fireboat.

In summary, cases from other jurisdictions support the contention that a variation in the use of bond proceeds from a purpose specified in the ballot proposition may be made as long as the general purpose of the bond issue is fulfilled.

Certainly, the cases from other jurisdictions authorize the variation in the use of bond proceeds now proposed by the City. The general purpose of the bond issue in question was to improve the fire protection facilities of the San Francisco Fire Department and this purpose would be attained through improvement of the existing fireboat.

The court in St. Louis County v. State Highway Commission, supra, held that voter approval of a ballot proposition listing of specific improvements as included in a more general purpose

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Chief of Department
San Francisco Fire Department

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did not require that each specific improvement be made. The definition of the term "include," as set forth by California courts, also supports this contention. The Court in People v. Western Airlines, Inc. (1954) 42 Cal.2d 621, 268 P.2d 723, stated:

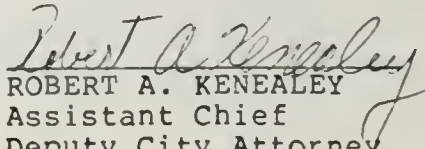
"The term 'includes' is ordinarily a word of enlargement and not of limitation. [Citations omitted] The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions. [Citations omitted]" Id. at p. 639.

Under the above reasoning, as well as under the general California principle that the City is not required to complete all proposed improvements if it lacks sufficient bond proceeds to do so, purchase of the new fireboat is optional. Therefore, variation from an optional improvement to one which still is authorized under the purpose of the bond issue seems to be permissible, even under California law.

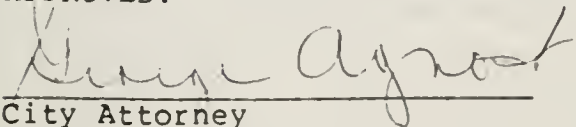
Section 43631 of the Government Code does state that when the legislative body determines by resolution that the expenditure of money raised by the sale of the bonds for the purpose for which the bonds were voted is impracticable or unwise, it may call a special election to obtain the consent of the electorate to use the money for some other specified municipal purpose. In the instant case, however, the "purpose" for which the bonds were voted would still be attained by improvement of the existing fireboat and, therefore, an election would not be required.

Respectfully submitted,

GEORGE AGNOST
City Attorney

By: 
ROBERT A. KENEALEY
Assistant Chief
Deputy City Attorney

APPROVED:


City Attorney

September 17, 1980

SUBJECT: Opinion 78/74 update; alteration or termination of Upper Ashbury Rehabilitation Assistance Program (RAP)

REQUESTED BY: Robert C. Levy, Superintendent
Bureau of Building Inspection

PREPARED BY: David Edward May
Deputy City Attorney

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QUESTIONS PRESENTED

1) Are any changes in Opinion 78/74 indicated?

2) Is it proper for the City & County to divert Community Development Block Grant (CDBG) funds which have been budgeted and approved for the Upper Ashbury Rehabilitation Assistance Program (RAP), thus arbitrarily causing "budgetary and fiscal limitations" resulting in the collapse of this program before its goals are attained?

CONCLUSION

(1) No. (2) No.

DISCUSSION

The primary source of funding for the Upper Ashbury RAP is the proceeds of the RAP bond issue (Resolution 832-76) as supplemented (Resolutions 681-78 & 121-80). These bonds were issued pursuant to the Marks-Foran Residential Rehabilitation Act of 1973, Health & Safety Code Sec. 39710 et seq. and in accordance with Chapter 32 of the San Francisco Administrative Code. Thus the state law with which the local ordinance and resolutions are in compliance sets forth the guidelines of a program which qualifies for federal assistance under federal law.

Nevertheless, because CDBG funds are essential for the administration of the Upper Ashbury RAP, diversion of CDBG funds would be tantamount to an abandonment of the entire program. As was pointed out in the City Attorney Opinion No. 78/74, such an intentional termination of this program would run a serious three-fold risk:

1. violation of state law
2. breach of contract with the bondholders
3. misrepresentation to H.U.D.

State law (Health and Safety Code Section 37922(c) & (e)) requires a commitment to achievement of program goals and specifically sets forth a 95% compliance standard. The required commitment has been made by the City & County of San Francisco repeatedly (e.g. Resolutions 854-76 & 77-77). While it is true that these commitments are subject to "budgetary and fiscal limitations," artificially creating these limitations by diverting funds already budgeted and approved would clearly be a subterfuge which the law would not countenance.

The purpose of the Upper Ashbury RAP program is to reverse the deterioration of the designated area, to prevent it from becoming a slum, and to foster an improvement of the real property values so as to attract increased investment in the area by old and new property owners, lending institutions and insurance companies. The measure of this goal is 95% code compliance.

Selection of an appropriate area was critical to this program. The likelihood of successful attainment of the program goals was essential to the sale of the bonds. Because the bondholders' sole recourse for redemption are the revenues and, ultimately, the property values of the mortgages (Resolution 832-76, Sec. 11.01), their risk is directly proportional to the probability of success of the program.

The bondholders have a right to expect (e.g. Resolution No. 832-76, Sec. 2.03) that the City and County will comply with state law ("Marks-Foran Act", Health and Safety Code Section 37922 (c) & (e)) and city ordinance (S.F. Admin. C. Section 32.11) and continue the program to completion. The bondholders have a right to expect the increase in property values and attraction of borrowers financially able to repay RAP loans which would naturally flow from enforcement of area wide code compliance and construction of public improvements. Abandonment of this program could impair the security of the bondholders.

Finally, City Attorney Opinion 78/74 points out that the City & County has committed itself to the federal government by its program representations in its application to HUD for CDBG funds. The opinion goes on to enumerate some of the remedies the federal government might employ to redress an abandonment of those commitments. Since the exercise of these remedies are discretionary with HUD officials, this is the least serious risk. However, it should be noted that HUD's continued designation of Upper Ashbury as an appropriate neighborhood strategy area and its continued approval of funding for this program adds substantial authority to the argument (which could be used by bond holders) that termination of the program in midstream is unjustified.

Since the issuance of Opinion 78/74, no new circumstances or changes in law affect the cogency of its analysis nor the

Robert C. Levy, Sup't, BBI

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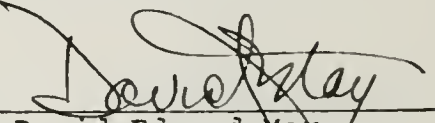
September 17, 1980

validity of its conclusions. Intentional abandonment of the Upper Ashbury RAP places the responsible agency in violation of state law and runs a high risk of litigation the probable outcome of which would be a liability upon the City & County of San Francisco.

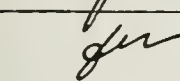
Respectfully Submitted,

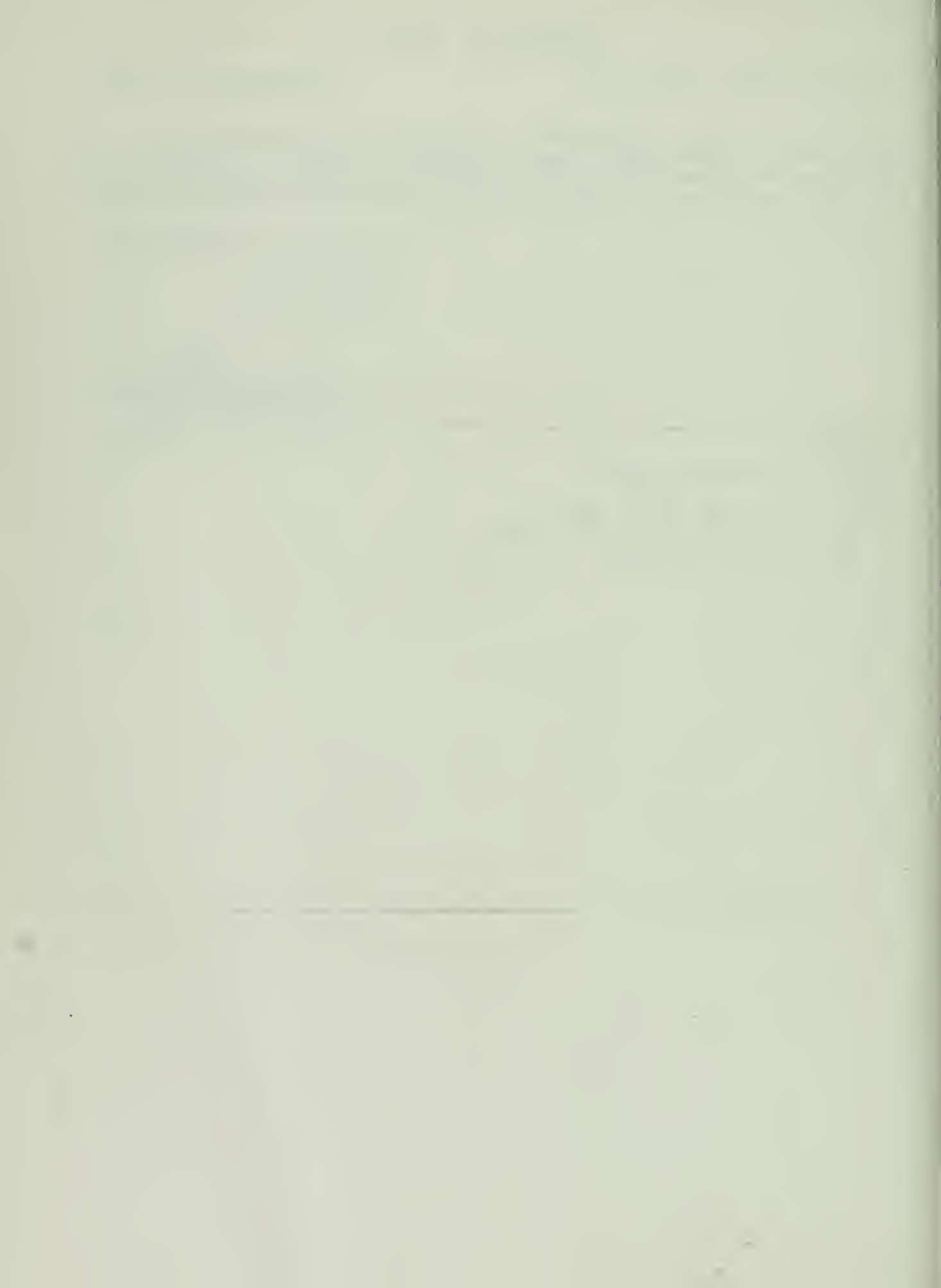
GEORGE AGNOST
City Attorney

By


David Edward May
Deputy City Attorney

APPROVED:


Chief Deputy City Attorney
 City Attorney



George Agnost,
City Attorney

September 29, 1980

OPINION NO. 80-60

90-60

SUBJECT: Status Rights of Senior Eligibility Worker,
Class 2905, to Eligibility Appeals Specialist,
Class 2911

REQUESTED BY: JOHN J. WALSH
General Manager, Personnel
Civil Service Commission

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OCT 7 1980

PREPARED BY: STEPHANIE M. CHANG
Deputy City Attorney

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QUESTION PRESENTED

Whether incumbents in Class 2905, Senior Eligibility Worker, who are presently performing the duties of proposed Class 2911, Eligibility Appeals Specialist, are entitled to status rights to Class 2911 under Section 18.03 of the Civil Service Commission Rules.

CONCLUSION

No.

ANALYSIS

Section 3.661 of the San Francisco Charter provides in relevant part:

"The [civil service] commission shall classify, and from time to time may reclassify, in accordance with the duties and responsibilities of the employment, and training and experience required, all places of employment in the departments and offices of the city and county not specifically exempted by this charter from the civil service provisions thereof, or which may be created hereafter by general law and not specifically exempted from said civil service provisions"

Section 8.200 of the San Francisco Charter states in relevant part:

"Positions in any office, agency, or department of the city and county may be created, as provided by this charter, by appropriation ordinance of the board of supervisors. . . . Before the appointing officer shall make recommendation for the creation of any new or additional position in any office, agency, or department, he shall request and receive from the [civil service] commission the proper designation and classification of such position based on the duties and responsibilities thereof, and if such position is included in the classified civil service, the commission may, in writing, express to the appointing officer its opinion as to whether or not such position is needed." (Section 8.200 of the San Francisco Charter.)

Your request for opinion states that, pursuant to a request from the Department of Social Services, the Civil Service Commission, in the exercise of its powers under Sections 3.661 and 8.200 of the San Francisco Charter, supra, has determined the need for the creation of a new classification of Eligibility Appeals Specialist, Class 2911. Your request for opinion states that the duties and functions of said proposed classification are presently being performed by persons in Class 2905, Senior Eligibility Worker, but that said duties and responsibilities are not properly described in the specification for Class 2905. Your staff has further determined, based on its survey of five bay area counties, that the rate of pay for the proposed Class 2911 should be 14% above that of Class 2905, Senior Eligibility Worker.

You have asked whether incumbents in Class 2905, Senior Eligibility Worker, who are presently performing the duties and responsibilities of the proposed Class 2911, Eligibility Appeals Specialist, are entitled to status rights to the proposed Class 2911, Eligibility Appeals Specialist, under Section 18.03 of the Civil Service Commission Rules.

In 1962 a survey known as the Jacobs Survey was conducted of all positions in the City service. At the time the Civil Service Commission adopted its Status Rights Rule, now found at Rule 18 of the Civil Service Commission Rules, to ensure that persons holding positions in the City service by virtue of examinations therefore, would not lose said rights as a result of reclassification of their positions under the Jacobs Survey. The purpose and intent of Rule 18 has not changed.

Section 18.03 of the Civil Service Commission Rules states:

"When the reallocation of a position or positions from a former class to a new class represents only the renumbering or retitling of the position or positions of the former class, and the class description and/or class specification has been changed to describe more accurately the duties actually being performed, all permanent employees in the former class are continued in the new class. Eligibles on lists in the former class are deemed to have rights to certification for appointment in the new class." [Emphasis added.]

The situation posed herein does not meet the requirements of Section 18.03 of the Civil Service Commission Rules, supra. The specification for proposed Class 2911 reveals significant differences between the duties and responsibilities required for said position and those required of Class 2905, Senior Eligibility Worker.

The job specification for proposed Class 2911 states in part:

"DISTINGUISHING FEATURES:

Class 2911 Eligibility Appeals Specialist is distinguished from other Eligibility Worker classifications by its responsibility for the completion of mandated appeals investigations for the Department of Social Services. Duties involve research, documentation and presentation of information and evidence in administrative law hearings, or municipal or superior courts. Positions in this class are further distinguished from others in the Eligibility Worker series by the responsibility for providing direction to other workers in the performance of those duties involving compliance with appeal procedures."

The difference in the duties and responsibilities for proposed Class 2911 and those of Class 2905 is furthermore reflected in the Civil Service Commission Staff's finding that the rate of pay for Class 2911 should be 14% above that of Class 2905.

Section 8.401 of the San Francisco Charter provides in relevant part:

"The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state;
...

"The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state."

Assuming that the rate of pay for Class 2905 complies with the mandate of San Francisco Charter Section 8.401, supra, and the Civil Service Commission Staff has determined, in compliance with San Francisco Charter Section 8.401, supra, that the rate of pay for proposed Class 2911 should be 14% higher than that of Class 2905, it can only be concluded that a significant difference exists between the duties and responsibilities of said classifications so as to justify the 14% difference in the rates of pay. In other words, a 14% difference in the rate of pay between Class 2905 and proposed Class 2911 can only be justified under San Francisco Charter Section 8.401, supra, where there are significant differences between the duties and responsibilities of said classifications.

The granting of status rights to incumbents in Class 2905 who are presently performing the duties of proposed Class 2911 would furthermore violate the fundamental requirement that rights to permanent positions in the city service be acquired by civil service examination.

The San Francisco Charter provides that all positions in all departments of the city and county shall be included in the classified civil service of the city and county except as specifically exempted by the charter. (San Francisco Charter Section 8.300.) The proposed Class 2911 does not fall within any of the enumerated exceptions provided in the San Francisco Charter, and hence, must be included in the classified civil service of the city and county. (San Francisco Charter Section 8.300, supra.)

The San Francisco Charter further provides that all appointments in the classified civil service, except temporary,

limited tenure and non-civil service appointments, must be made on the basis of "merit and fitness, as shown by appropriate tests." (San Francisco Charter Section 3.661.) A city charter is a limitation of power to the extent that restrictions are expressly stated therein. (Miller v. City of Sacramento (1977) 66 Cal.App.3d 863, 867.) Hence, the authority of the Civil Service Commission to certify persons for appointment to positions in the classified civil service is restricted insofar as said appointments must be based on "merit and fitness, as shown by appropriate tests." (San Francisco Charter Section 3.661, supra.)

While those persons who are presently performing the duties of proposed class 2911 have arguably exhibited their competence for the proposed position of Eligibility Appeals Specialist by their daily performance, they have not exhibited their "merit and fitness" by "appropriate tests." (San Francisco Charter Section 3.661, supra.) The position for which they have exhibited their merit and fitness, as shown by appropriate tests, is that of Senior Eligibility Worker, Class 2905, which, as discussed supra, is a distinctly different classification than that of Eligibility Appeals Specialist, Class 2911. The grant of status rights urged by said incumbents would in effect result in appointments to said incumbents without an examination.

Merit and fitness exhibited by performance on the job is not a proper basis for acquiring rights to a permanent position. An example of this is found at Section 8.331 of the San Francisco Charter. Section 8.331 authorizes limited tenure appointments through informal and non-competitive tests when lists of eligibles are not available. However, persons serving in said limited tenure appointments "shall by reason of such service acquire no right or preference to permanent civil service status". (Id.) The same should apply herein.

Furthermore, the Staff Report in support of the proposed Class 2911 states that only ten persons in Class 2905 who are members of the Appeals Unit in the Special Administrative Services Section (SASS) of the Department of Social Services are presently performing the duties of the proposed Class 2911. Under Section 18.03 of the Civil Service Commission Rules, supra, all permanent employees as well as eligibles on lists for Class 2905 would have to be granted status rights to Class 2911. If status rights from Class 2905 to Class 2911 were granted under Section 18.03 of the Civil Service Commission Rules, supra, persons other than the ten in the Appeals Unit in the Special Administrative Services Section would thereby acquire rights to positions for which they have not exhibited their merit and

September 29, 1980

fitness by performance on the job or by examination. Such a result would be totally repugnant to the civil service merit system.

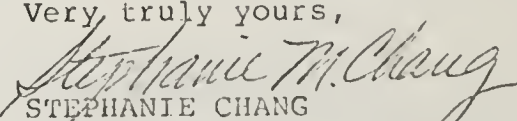
The 5% guideline found at Section 18.04(a)(5) of the Civil Service Commission Rules does not create an irrebutable presumption in violation of due process, as alleged by the incumbents. The 5% guideline is merely a guideline to assist in determining whether the positions in question are sufficiently related in their duties and responsibilities to justify granting of status rights.

Due process is a principle which requires in this context an opportunity to be heard and present evidence. The 5% guideline of Section 18.04(a)(5) of the Civil Service Commission Rules does not deny due process in that it does not in any way preclude the opportunity to be heard and present evidence.

In your request you stated that Ilene Jones Addison, attorney for the incumbents, has "presented her arguments to the Commission verbally and submitted a Hearing Brief outlining her position." Due process has been observed herein insofar as the incumbents, through their representative, have been given an opportunity to be heard and to present evidence in support of their contention that the classifications in question are sufficiently similar to justify status rights from Class 2905, Senior Eligibility Worker, to proposed Class 2911, Eligibility Appeals Specialist.

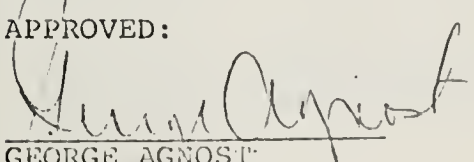
For the foregoing reasons it is this office's opinion that incumbents in Class 2905, Senior Eligibility Worker, who are presently performing the duties of proposed Class 2911, Eligibility Appeals Specialist are not entitled to status rights to proposed Class 2911 under Section 18.03 of the Civil Service Commission Rules, supra. You are so advised.

Very truly yours,


STEPHANIE CHANG

Deputy City Attorney

APPROVED:


GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

September 25, 1980

OPINION NO. 80-61

SUBJECT: Collection of Assessments

REQUESTED BY: Quentin L. Kopp
Board of Supervisors

PREPARED BY: George E. Krueger
Deputy City Attorney

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OCT 7 1980

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QUESTION PRESENTED

Does existing City and State legislation adequately address the problem of collection of assessments?

CONCLUSION

Yes.

ANALYSIS

You have forwarded the Public Defender's request for legislation authorizing the contracting out of the collection of assessments.

The Public Defender states that under State law, "the Municipal and Superior Courts are authorized to assess clients of the Public Defender or clients of appointed counsel for the costs of legal services which have been provided." His concern is that the assessments are not being made because the collection machinery is ineffective.

As discussed below, my research indicates that the proposed legislation is unnecessary and duplicative of appropriate City and State legislation already in place. For this reason, the requested legislation has not been prepared.

First, Charter Section 3.401(b) transfers City Attorney duties for revenue collection to a civil service attorney for the bureau of delinquent revenue collection:

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Quentin L. Kopp

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September 25, 1980

"The duties of the city attorney in connection with the bureau of delinquent revenue collection shall be transferred to and performed by the attorney for said bureau who shall be subject to the civil service provisions of this charter."^{1/}

I have spoken to that attorney, Robert L. Fletcher, and he advises me that since he is the only attorney working in that department, all of his time is spent collecting unpaid taxes: business, payroll, hotel, parking and unsecured personal property. Because the assessments which do come to the bureau of delinquent revenue collection are in the form of a final judgment, they are handled administratively without assistance of Attorney Fletcher. One staff member, under the direction of the bureau supervisor, contacts the assessees and attempts to establish a repayment schedule. If that effort is unsuccessful, execution on the debtor's assets is the next procedure. However, the bureau supervisor advises that execution on such assessments has not been accomplished because of the paucity of financial information available concerning the assessee. In counties^{2/} that have established procedure for collection of public defender assessments, financial information relevant to the assessee's ability to pay is furnished to a central collection department.

The first option to improve collection of assessments, therefore, is to augment the collection personnel of the bureau of delinquent revenue collection.

Secondly, Charter Section 8.300-1 provides:

"8.300-1. Civil Service Positions -
Additional Exceptions.

"Notwithstanding the provisions of Section 8.300 of the charter, the following positions shall not be included in the classified civil

^{1/} The bureau of delinquent revenue collection was established in 1935 and its operation was placed under the Tax Collector. In 1948, the duties of the City Attorney in regard to revenue collection were transferred to the attorney for the bureau of delinquent revenue collection.

^{2/} San Diego and San Joaquin counties.

service of the city and county and shall not be filled from lists of eligibles prepared by the civil service commission.

"Positions determined by the controller and approved by resolution of the board of supervisors to be positions where the work or services can be practically performed under private contract at a lower cost to the city and county than similar work or services performed by employees of the city and county; provided that no work or services shall be contracted where such work or services are required to be performed by officers or employees of the city and county under the provisions of this charter or other applicable law."

Clearly, this section allows the City to contract out certain services, with the positions not included in the classified civil service.

As stated in City Attorney Opinion No. 78-80:

"The plain language of Charter Section 8.300-1 states that positions shall not be included in the classified Civil Service of the City and shall not be filled from lists of eligibles where (1) such positions are determined by the Controller to be positions where the work or services can be practically performed under private contract at a lower cost to the City, and (2) such positions determined by the Controller are approved by resolution of the Board of Supervisors to be positions where the work or services can be practically performed under private contract at a lower cost to the City."

Under Section 8.300-1, then, the City has the option of contracting out the collection service if the conditions are met regarding cost and practicality of performance:

". . . Section 8.300-1 . . . contemplates that the work or services are not only less costly to the City but also that the work or services can be practically performed under private contract. The Board of Supervisors must,

OPINION NO. 80-61

Quentin L. Kopp

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therefore, not only give their approval by resolution to the cost features of the contract but also to whether or not the contract before it can be practically performed under private contract at a lower cost."

(City Attorney Opinion No. 78-80.)

The third option to improve collection of assessments is found in the City Administrative Code, Section 10.39, enacted by the Board of Supervisors in 1960. It provides that the bureau of delinquent revenue is to collect all city claims for money, except for claims assigned by the board of supervisors to a collection agency:

"The bureau of delinquent revenue collection shall energetically prosecute the collection of all claims for money due the several city and county departments and offices when such claims are filed with the bureau, except such claims as are assigned for purposes of collection to a duly licensed collection agency of the state of California by the board of supervisors."

The last option to improve collection of assessments is found in the next section of the Administrative Code, Section 10.39-1, also enacted in 1960:

"Upon recommendation of the bureau of delinquent revenue collection, delinquent accounts or abandoned accounts may be assigned for purposes of collection by the board of supervisors pursuant to the provisions of section 26220, 26221 and 26222 of the government code of the state of California."

This section clearly authorizes the board of supervisors to assign delinquent or abandoned accounts to a collection agency.

In Lara v. Kern County Board of Supervisors (1976) 59 Cal.App.3d 399, the Court took judicial notice of 22 state counties which had entered into private agreements for collection of delinquent accounts, under the authority of Government Code Section 26220, which provides in pertinent part:

Quentin L. Kopp

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September 25, 1980

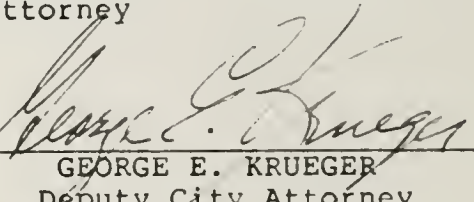
"The board of supervisors may by a four-fifths vote of its members assign for purposes of collection under such terms and conditions as the board may prescribe any or all delinquent bills, claims and accounts, thirty (30) days after the date upon which they are due and payable to the county, and any or all money judgments taken in the name of the county, to a collection agency duly licensed by the State of California. . . ."

To summarize, existing City legislation (Charter and Administrative Code) allows for the collection of accounts by the bureau of delinquent revenue collection, by a private firm under contract with the City, or by a licensed collection agency under assignment by the Board of Supervisors. State law supports the authority of the Board of Supervisors to assign delinquent accounts to a licensed collection agency for collection. I believe what is needed is a coordinated effort at assessment and collection by the Municipal and Superior Court judges, the bureau of delinquent revenue collection and the Board of Supervisors. The legislation supporting such an effort is already in place.

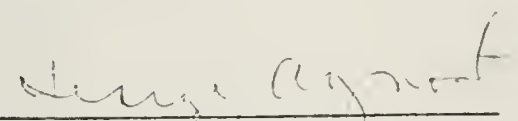
Very truly yours,

GEORGE AGNOST
City Attorney

By: _____


GEORGE E. KRUEGER
Deputy City Attorney

APPROVED:



City Attorney

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80-62

CITY AND COUNTY OF SAN FRANCISCO

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CITY ATTORNEY
CITY HALL

October 6, 1980

OPINION NO. 80-62

SUBJECT: Payment of Overtime to Uniformed
Members of Fire Department

REQUESTED BY: ANDREW C. CASPER, Chief
San Francisco Fire Department

PREPARED BY: MICHAEL C. KILLELEA
Deputy City Attorney

QUESTIONS PRESENTED

1. Whether the Fire Department is legally obligated to pay Richard Dineen, an H10 Chief's Operator, for 591 hours of overtime worked.
2. If he is entitled to overtime pay, is that amount limited to 80 hours by Mayor Feinstein's directive of March 29, 1979.
3. Is the Fire Department legally obligated to continue Mr. Dineen on its payroll for the period necessary to reimburse him for compensatory time earned.

CONCLUSION

1. Yes.
2. No.
3. No.

ANALYSIS

Mr. Richard Dineen, an H10 Chief's Operator, was assigned duties as a Breathing Apparatus Supervisor on a five-day, 40-hour work week. At the direction of the Chief of Department, he worked 591 overtime hours. Mr. Dineen is

OPINION NO. 80-62

Andrew C. Casper

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October 6, 1980

now on disability leave and he has requested compensation for the 591 overtime hours that he worked.

Section 8.452 of the Charter of the City and County of San Francisco provides in relevant part:

"When in the judgment of the fire commission, it is in the public interest that an, such officer or member shall work on his day off and said officer or member consents to so work, he may at the direction of the chief of the department work on said day off, and in addition to the regular compensation provided for said officer or member as set forth in this charter, said officer or member shall be entitled to be compensated at his regular rate of pay as provided for herein for said extra time served, or he shall be allowed the equivalent time off."

On March 29, 1979, the Mayor issued a memorandum to all departments in which she requested that they limit employees in the executive, administrative and professional Z classifications to a maximum of twenty (20) days of compensatory time in any fiscal year. The Mayor's memorandum is not applicable to uniformed members of the San Francisco Fire Department.

Section 8.452 of the Charter authorizes the payment of overtime or the allowance of equivalent time off to uniformed members of the Fire Department without any limitation when such member is directed by the chief of department to work on regular days off. In this case. Mr. Dineen worked an 8-hour day, 5 days a week. Therefore, if he was requested to work overtime hours beyond his normal work schedule, it is my opinion that he is entitled to be compensated for such hours or to receive time off for an equivalent number of hours in accordance with Section 8.452 of the Charter.

However, it should be noted that an employee's claim for money owed by the city is governed by a three years statute of limitation (Section 338(1), Code of Civil Procedure). Therefore, you should determine whether the overtime has been accumulated within three years prior to Mr. Dineen's claim for compensation since only that portion

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Andrew C. Casper

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October 6, 1980

may be legally paid. (See City Attorney Opinion No. 1451, June 20, 1960.) Even though the City can raise the statute of limitations as a bar to the employee's overtime accumulated more than three years prior to his claim, the statute can be waived by a three-fourths vote of all members of the Board of Supervisors (Section 2.300, Charter).

The payment of overtime should be made by submitting a retroactive payroll for overtime hours worked by Mr. Dineen during the three-year period preceding his request for payment.

Very truly yours,

GEORGE AGNOST
City Attorney

By:

Michael C. Killelea
MICHAEL C. KILLELEA
Deputy City Attorney

APPROVED:

George Agnost
City Attorney

MCK:css

0135B



George Agnost,
City Attorney

October 15, 1980

OPINION NO. 80 - 63

SUBJECT: Issue of Permits to Use Park Property for
Worship Services

REQUESTED BY: Martin Greenlaw
Recreation and Park Department

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Elizabeth M. Katz
Legal Assistant

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OCT 27 1980

CITY OF SAN FRANCISCO
LEGAL DEPARTMENTQUESTION PRESENTED

May the Recreation and Park Commission issue permits to denominational and non-denominational groups wishing to hold worship services on property under the Commission's jurisdiction?

CONCLUSION

The Recreation and Park Commission may issue permits to denominational and non-denominational groups wishing to hold worship services on property under the Commission's jurisdiction, provided that it does not favor use of park property by religious groups over use by secular groups and does not favor one religious group over another religious group.

ANALYSIS

You have advised this office that various denominational and non-denominational groups have applied to the Commission for permits to hold Easter sunrise services at various locations within the Commission's jurisdiction, and you have asked whether permits for these services may be granted. In order to enable you to act on these applications, this office advised you orally and by memorandum that permits for these services may be issued subject to certain guidelines. We now provide this Opinion in order to address a question of enduring interest: whether the Commission may, in general, grant permits for worship services on property under the Commission's jurisdiction. The question you have presented to

this office requires the balancing of two constitutional provisions: the guarantee of free exercise and enjoyment of religion without discrimination or preference and the prohibition against an establishment of religion. We first review these provisions.

Relevant Constitutional Provisions

The First Amendment to the United States Constitution provides, in relevant part, that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, ...

The Supreme Court of the United States, in Cantwell v. State of Connecticut (1940) 310 U.S. 296, 303, stated:

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

In addition, the California Constitution, Article I, Section 4 has long expressed a similar purpose. As adopted at the 1849 Constitutional Convention, this Article and Section read, in relevant part:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be allowed in this State"

The 1874 Constitutional Convention strengthened the language of this Article and Section by substituting the word "guaranteed" for "allowed". In 1974, the law as formerly worded was repealed, and the present language was adopted by vote of the people. The Constitution now provides, in relevant part:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . .
The Legislature shall make no law respecting an establishment of religion.

. . . .

Moreover, the California Constitution, Article XVI, Section 5 provides, in relevant part:

Neither the Legislature, nor any . . . city and county . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . . nor shall any grant or donation of personal property or real estate ever be made by the state, or any . . . city and county . . . for any religious creed, church, or sectarian purpose whatever . . .

This provision appeared in the Constitution of 1879 as Article IV, Section 30. In 1966, it appeared as Article XIII, Section 24; the present provision has been effective since 1974.

Public Parks

The question you have presented to this office also involves a special kind of government property. At one time, it was thought that a municipality could prohibit First Amendment activities in streets and parks on the ground that they constituted an unauthorized use of such facilities. Davis v. Massachusetts (1897) 167 U.S. 43. But in Hague v. C.I.O. (1939) 307 U.S. 496, the United States Supreme Court actually overruled Davis when it proclaimed at 515:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

See In re Hoffman (1967) 67 Cal. 2d 845, 849. The Court in that case also noted, at 849-850:

In a series of cases following Hague v. C.I.O., the Supreme Court determined that a regulation of First Amendment activities in streets and parks must be supported by a valid municipal interest that cannot be protected by different or more narrow means. Such activities can be regulated only to the extent necessary to

prevent interference with the municipality's interest in protecting the public health, safety, or order or in assuring the efficient and orderly use of streets and parks for their primary purposes. [Citations omitted.]

See also Parr v. Municipal Court (1971) 3 Cal.3d 861, 871.

After a more thorough review of United States Supreme Court decisions following Hague (specifically, of Cox v. New Hampshire [1941] 312 U.S. 569, Saia v. New York [1948] 334 U.S. 558, Niemotko v. Maryland [1951] 340 U.S. 268, Kunz v. New York [1951] 340 U.S. 290, Cox v. Louisiana [1965] 379 U.S. 536, and Shuttlesworth v. Birmingham [1969] 394 U.S. 147), the California Supreme Court concluded in Dillon v. Municipal Court (1971) 4 Cal.3d 860, 869-870:

We believe that the foregoing cases, taken together, manifest the following constitutional principles: In determining whether a statute regulating speech violates the First Amendment, we must weigh the state's interest in maintaining peace and order in the streets and other public places against the individual's right to freedom of speech and assembly. When this balance is struck, statutes requiring licenses for parades and demonstrations will not offend the Constitution if they regulate only the time, place, manner and duration of the marches and if they are fairly administered by officials within the range of narrowly limited discretion. On the other hand, any procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination on the content of the ideas sought to be expressed.

It therefore becomes apparent that, in both federal and state law, the public parks are held in trust for the exercise of First Amendment activities. Regulation of the use of public parks for such activities may only relate to time, place and manner of use, and such regulations must be fairly administered. That is, permits to use the public parks must be made available to all, without discrimination on the basis of the content of ideas to be expressed. In granting or denying permits to use public parks, the government may not distinguish between religions. Fowler v. Rhode Island (1953)

345 U.S. 67. Likewise, the government may not distinguish between religious and secular, even anti-religious, groups. O'Hair v. Andrus (1979) 613 F.2d 931, 934.

Permit Procedures

We emphasize that permit procedures must be neutral and applied in a neutral fashion. A procedure which allows such ample room for administrative discretion as to give free play to discrimination on the basis of the content of the ideas which applicants seek to express will not be upheld by the courts.

In Niemotko v. Maryland, supra, a state court convicted a group of Jehovah's Witnesses on a charge of disorderly conduct arising from their use of a public park for Bible talks without a permit. Municipal authorities had denied their application for a permit based not on a statutory authority, but rather on an amorphous local practice having no standards or limitations. The United States Supreme Court reversed the convictions on that ground. In Kunz v. New York, supra, a Baptist minister was convicted for holding a religious meeting on a public street without a permit. Municipal authorities had denied his application for a permit in an exercise of power derived from a city ordinance which did not specify reasons for which a permit could be refused. The United States Supreme Court reversed the conviction on that ground. In Fowler v. Rhode Island, supra, the court reversed the conviction of a minister of Jehovah's Witnesses for addressing an orderly meeting of his congregation in a public park. The conviction had been based on an ordinance prohibiting anyone from "addressing" a "religious meeting" in public parks. However, officials conceded in oral argument before the trial court that the ordinance had not been applied to prohibit "church services" in the parks. To the court, this admission demonstrated state preference of some religious groups over another. And in O'Hair v. Andrus, supra, avowed atheists sought to prevent the Pope from celebrating a Mass on park land. They conceded at trial and at oral argument that the Pope could be issued a permit to deliver a sermon, but argued that the unique religious nature of the Mass precluded the right to a permit. The Court rejected their argument, stating at 936:

Such a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity - an impossible task in an age where many and various beliefs meet the constitutional definition of

religion. The administration of such a test would impermissibly entangle government and religion.

We turn now to the question whether the use of the parks for worship services constitutes an establishment of religion.

Establishment of Religion

The framers of the United States Constitution are said to have intended the Establishment Clause and the Free Exercise Clause as supplemental and compatible means to achieve religious freedom. O'Hair v. Andrus, supra, 613 F.2d at 935. "Despite this intended harmony, 'serious tension has often surfaced between the two clauses.'" Id.

The Supreme Court of the United States, in Zorach v. Clauson (1951) 343 U.S. 306 at 312, set forth what is known as the "accommodation" concept of the First Amendment:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups.

While on the one hand, government is not required to be hostile toward religion, on the other hand, government may not lean so far in the opposite direction as to fall among the evils of "sponsorship, financial support, and active involvement of the sovereign in religious activity" (Walz v. Tax Commission (1970) 397 U.S. 664, 668), the evils which the First Amendment was intended to dispel.

The Supreme Court of the United States has evolved three tests to determine whether a particular law violates the Establishment Clause of the First Amendment. First, the legislation in question must have a secular purpose. Everson v. Board of Education of the Township of Ewing (1946) 330 U.S. 1. Second, the law at issue must have a primary effect that neither advances nor inhibits religion. McGowan v. State of Maryland (1961) 366 U.S. 420. See Abington School District v. Schempp (1963) 374 U.S. 203. Third, the legislation in question must avoid excessive government entanglement with religion. Walz v. Tax Commission, supra. See Committee for Public Education and Religious Liberty v. Nyquist (1973) 413 U.S. 756. These tests are not precise instruments, however, and must be used more as guidelines. Tilton v. Richardson (1971) 403 U.S. 672, 677-678.

Governmental action, as well as law, may be challenged under the Establishment Clause. Illinois ex rel McCollum v. Board of Education (1948) 333 U.S. 203. See also Allen v. Morton (D.C. Cir. 1973) 495 F.2d 65.

The California Supreme Court has adopted these tests to ascertain whether state statutes or actions violate the Establishment provision of the Federal Constitution. California Educational Facilities Authority v. Priest (1974) 12 Cal.3d 593, 599.

The tests are conjunctive, and government action to which they are applied must satisfy each of them in order to withstand constitutional scrutiny. Mandel v. Hodges (1976) 54 Cal.App.3d 596, 613.

Since the present language of California Constitution, Article I, Section 4 was adopted in 1974, that Section has contained an Establishment Clause virtually identical to that of the First Amendment to the United States Constitution. The identity of language

suggests that state action reached by both should be tested by the courts of California according to the same standards which the United States Supreme Court employs in applying the federal language. (Citations omitted.)

Mandel v. Hodges, supra, at 616.

Article XVI, Section 5 was, according to the California Supreme Court in California Educational Facilities Authority v. Priest, supra, at 604,

intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.

The Court emphasized, in footnote 12 at 605, that the Section

forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.

Thus, the Court stated at 605,

The crucial question is not whether the Act provides . . . a benefit, but whether that benefit is incidental to a primary public purpose.

An application of the three-pronged test outlined above to the facts in the instant case compels the conclusion that the issuance of permits to groups wishing to hold worship services in public parks does not amount to an establishment of religion. It is important to note that the basic purpose of permit procedures is to implement the Recreation and Park Commission's duty to provide recreational facilities to the public. The City has not set aside any facility for religious worship; rather, park property is made available for public assemblies of various sorts. Therefore, the primary purpose of the permit procedure is clearly secular. Its primary effect is to foster and promote the exercise by citizens of their First Amendment right to freedom of assembly. Moreover, the City is in no way excessively entangled with religion. It issues permits to religious groups on the same basis as to any other group, neither inquiring into the nature of the belief or conduct of these events nor treating some groups differently from others.

An argument may be raised that the expenditure of public funds for parks creates an impermissible benefit when groups use parks for worship services. In Bowker v. Baker (1946) 73 Cal.App.2d 653, 666, the Court of Appeal remarked:

When we consider the complexities of our modern life we realize that many expenditures of public money give indirect and incidental benefit to denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief. No one has yet challenged the right of any law abiding citizen to travel to a school over a highway built with public funds because of his religious beliefs or because he is attending a denominational institution, yet to paraphrase the expression used in Judd v. Board of Education, supra, without roads over which pupils could reach the school there would be no school. Police and fire departments give the same protection to denominational institutions that they give to privately owned property and their expenses are paid from public funds.

It is submitted that parks - like sidewalks, streets, roads, highways and sewers - are furnished for the use of all citizens regardless of religious belief, and that the use of parks for worship services provides a benefit to religion which is incidental to the primary public purpose. Parks are provided for public recreation and Charter Section 3.552 directs the Recreation and Park Commission to promote this purpose. Webster's Seventh New Collegiate Dictionary (1967) defines "recreation" as "refreshment of strength and spirits after toil". In McClure v. Board of Education (1918) 38 Cal.App. 500, 501, the Court defined "recreation" broadly, including not only the above definition, but also "relief from toil or pain". It is obvious that while some may find recreation in spiritual observances, others may find recreation in secular pursuits. The recreational purpose of parks may encompass both groups.

It may be argued that the time spent processing permit applications constitutes an appropriation in violation of Article XVI, Section 5 of the California Constitution, quoted above at p.3, insofar as salaries benefit the religious groups seeking permits. In California Education Facilities Authority v. Priest, supra, the California Supreme Court considered whether public salaries of members of the Education Facilities Authority constituted an appropriation in violation of Article IX, Section 8 of the California Constitution, prohibiting appropriations for sectarian and denominational schools, as well as all other nonpublic schools, insofar as their salaries benefitted private, and especially religious, institutions. The Court held that the argument was without merit and reasoned at 604:

Many other officials on the public payroll have occasion to spend some portion of their working time processing applications by sectarian schools, relating to such matters as incorporation, tax exemption, zoning, health and safety inspections, building permits, and parking regulations; and, of course, fire and police protection is provided personnel and property of private as well as public institutions.

We likewise conclude that, in the instant matter, there is no violation of Article XVI, Section 5. Still, a question may arise whether government officials and employees may be otherwise involved in worship services on public park lands.

In Allen v. Morton, supra, government involvement with the celebration of Christmas had been limited to a presentation to the President of the National Community Christmas Tree until 1954. At that time, a coalition of government, business and clergy formed The Pageant of Peace, Inc. to sponsor programs and exhibits collectively known as the Christmas Pageant of Peace. Among the exhibits was a creche. The Pageant occurred on National Park land, and the government co-sponsored it and provided further assistance in the assembly, dismantling, cleaning and restoration of the area, along with various materials and equipment used in the Pageant. In 1968, such services were valued at nearly \$72,000.

The Court in Allen v. Morton unanimously concluded that government membership in the Christmas Pageant of Peace, Inc. excessively entangled government with religion and thus violated the Establishment Clause.

In O'Hair v. Andrus, supra, the federal government was prepared to spend an estimated \$128,450 to \$178,450 in connection with the Papal celebration of a Mass on park land. The expenditures were for crowd control, sanitary and health facilities, electrical current, and traffic control. The Court rejected the contention that such expenditures violated the separation of church and state, since provision of police, sanitation and related public services is a legitimate government function, necessary to facilitate any large assembly in parks (Id. at 936). In fact, the government had provided such services for Resurrection City, The Moratorium, The Farm Tractors Protest and other large events, (Id. at 938). There was no indication that, by such expenditures, the government was endorsing the ideas expressed.

Finally, it may be argued that if permits are granted for Easter sunrise services, the door will have been opened to the virtual conversion of the public parks into outdoor churches. A similar argument was raised, and rejected, in O'Hair v. Andrus, supra. The Court stated, supra at 936:

The law has the ability of preventing sound doctrine from being pushed to unsound extremes. These regulations [of the Department of the Interior] have provisions to guard against excessive use and appropriation of the parkland by any group, and to ensure against preclusion of others. If those provisions prove ineffective, the courts can provide rulings on the basis of the questions that arise in the light of concrete factual showings.

In light of the cases discussed above, we conclude that the expenditure of funds for parks does not constitute an impermissible benefit when groups use parks for worship services and that the salary appropriations for time spent by recreation and park officials and employees processing permit applications for worship services in the parks do not constitute an impermissible use of public funds. The City may legitimately provide crowd and traffic control, sanitary facilities and electrical current for religious events in the parks if it does so for all other events. The City may not co-sponsor a religious event in the parks, nor may it be part of a coalition with clergy to sponsor such events.

You are so advised.

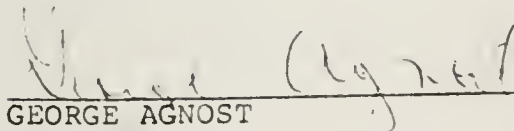
Respectfully submitted,



BURK E. DELVENTHAL
Deputy City Attorney

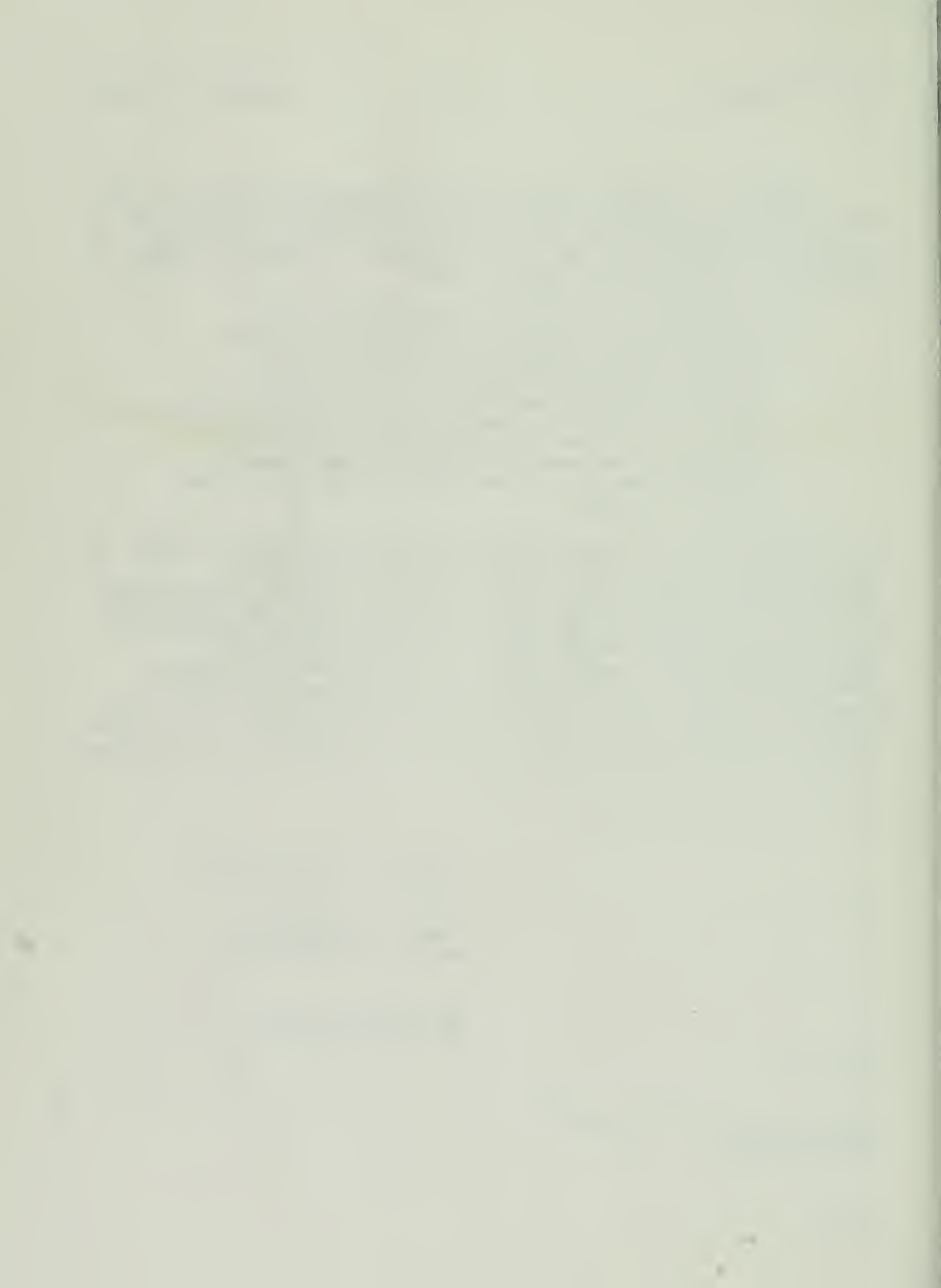
ELIZABETH M. KATZ
Legal Assistant

APPROVED:



GEORGE AGNOST
City Attorney

EMK/ay
7254b



George Agnost,
City Attorney

OPINION NO. 80-64

July 22, 1980

DOCUMENTS DEPT.

SUBJECT: Opinion on Firearm Policy
San Francisco Fire Department
Arson Investigators

OCT 7 1980

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REQUESTED BY: Chief Andrew Casper
San Francisco Fire Department

PREPARED BY: Jerome A. DeFilippo
Deputy City Attorney

QUESTIONS PRESENTED

- 1) Do you have a legal responsibility to issue firearms to arson investigators as safety equipment?
- 2) May such equipment be issued optionally?
- 3) Is liability possible for on-duty use of firearms?
- 4) Is there a requirement to provide weapons for both on-duty and off-duty use?
- 5) May the San Francisco Fire Department adopt the San Francisco Police Department Rules for use of firearms?

CONCLUSIONS

- 1) Generally yes, depending upon the scope of duties imposed on your personnel in the discription of their job classification.
- 2) Yes.
- 3) Yes.
- 4) No.
- 5) Yes.

July 22, 1980

ANALYSIS

You have asked this office to advise you concerning the providing and use of firearms by members of your department assigned to investigation of arsons.

Your request states that such members of your department are afforded peace officer status pursuant to California Law and each has completed the law imposed training in arrest and firearm use as required by penal code section 832.

The response to your fire specific questions are predicated upon those statements.

1) Your responsibility to provide an employee with the necessary safety equipment to protect him from injury in the performance of his assigned duties is found in the California Administrative Code, Title Eight, Article 12, more commonly known as CALOSHA rules.

Penal Code section 830.3(k) confers peace officer status upon arson investigators provided "that the primary duty of arson investigators shall be the detection and apprehension of persons who have violated or who are suspected of having any fire law . . . "

Under existing California law, Arson remains one of the few dangerous felonies which permits the use of deadly force to complete the apprehension.

Since the duties of your investigators, as assigned by you, bring them into the peace officer status as set out in Penal Code 830.3(k), it is the opinion of this office that there is a responsibility of the employer to the employees to provide the necessary safety equipment. This of course would include a weapon and possibly the bullet proof vest such as those which were recently provided to members of the S.F.P.D.

2) It is the opinion of this office that you would have the option to provide such firearms to your arson investigator who qualified as peace officers if such weapons would not be deemed necessary safety equipment within their job description..

3) The law is clear that the tortious conduct of an employee acting within the course and scope of his employment may result in liability for his employer.

July 22, 1980

The basis for such liability can be founded in either the negligent or intentional conduct of the employee in the use of the firearm, and on the failure of the employer to adequately train the employer in its use.

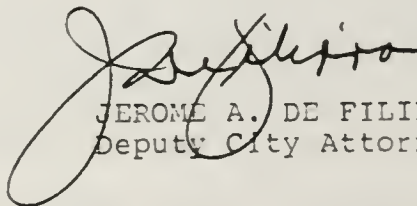
4) As set out in (1) above, the obligation of the employer is to provide the necessary safety equipment required for performance of the duties imposed. Unless your job description of arson investigator imposes a duty on the employee to carry a weapon with him while off duty, there is no obligation to furnish an off-duty weapon.

As you may recall, the San Francisco Police Department did have such a rule however the Police Commission, by resolution, modified the off duty weapon requirements and it is now optional with the officer.

You and the Fire Commission through adoption of appropriate rules may permit the investigator to optionally arm himself while off duty, or in the alternative you may restrict or forbid the carrying of weapons by Arson Investigators while off-duty. In either case there would be no obligation for the employer to furnish such an off duty weapon as an item of safety equipment.

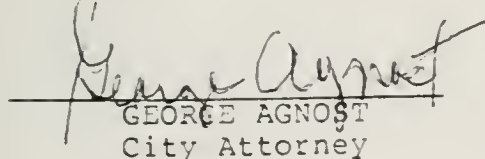
5) We have reviewed the fire arm procedure of the San Francisco Police Department which you furnished with your request and are of the opinion that it is an accurate statement of the current law which can be adopted by the San Francisco Fire Department.

Very truly yours,



JEROME A. DE FILIPPO
Deputy City Attorney

APPROVED:



GEORGE AGNOST
City Attorney

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80-65

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

October 9, 1980

OPINION NO. 80-65

SUBJECT: Legality and Effect of Departmental Memorandum
of Understanding; Public Utilities Commission

REQUESTED BY: John J. Walsh
General Manager, Personnel
Civil Service Commission

DOCUMENTS DEPT.

PREPARED BY: McMorris M. Dow
Utilities General Counsel

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QUESTIONS PRESENTED

1. Is the subject matter of the MOUs dated November 5, 1979 and December 3, 1979 subject to the requirements of Charter Section 8.404?

ANSWER: No.

2. Is it permissible and, under what provisions, for memoranda of understanding to be signed and agreed to after August 25th, in view of the Charter's requirement that the Board of Supervisors fix rates of pay and working conditions not later than August 25th?

ANSWER: Departmental MOUs may be entered into at anytime. In addition, it is permissible when the Board of Supervisors, in the master MOU, delegates to the department the determination of working conditions within the framework of the master MOU. Also, it is permissible when it is impossible to make the necessary determination by August 25.

3. Regardless of your answer to No. 1 above, is it acceptable and legal to enter into subsequent memoranda of understanding dealing in part with items that are covered, or should be covered in the first, formal memorandum of understanding referred to above particularly in the absence of a re-opener clause?

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Mr. John J. Walsh

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ANSWER: Yes - the subject matter was within the discretion of the department (PUC) and therefore, a supplemental MOU could be entered into at anytime; such items agreed upon in the master MOU, could be changed without concurrence of the Board of Supervisors. In this instance, however, the items contained in the two departmental MOUs were not changes to items contained in the master MOU.

4. Does the subsequent MOU replace prior agreements in whole or in part?

ANSWER: No.

5. If in fact subsequent MOUs are appropriate, are such amended MOUs deficient and ineffective because they lack the signatures of the Mayor, the President of the Board of Supervisors and the Director of Employee Relations?

ANSWER: No.

ANALYSIS

You have asked a number of questions relative to the legality and effect of departmental MOUs entered into between the Transport Workers Union and the Public Utilities Commission dated November 5, 1979 and December 3, 1979, the latter having superseded the former. Your questions particularly relate to the effect, if any, of the two departmental MOUs on the MOU dated September 13, 1979 and executed on behalf of the City by the Mayor, the President of the Board of Supervisors, the Director of Employee Relations, and departmental representatives (General Manager of Public Utilities and General Manager of the Municipal Railway).

The two departmental MOUs were executed on behalf of the Public Utilities Commission by the General Manager of Public Utilities. Each of the three MOUs was approved as to form by a deputy city attorney.

The master MOU (so designated to differentiate it from the two departmental MOUs) is dated September 13, 1979. It treats generally of wages and working conditions for transit operators working streetcars, trolley coaches, motor coaches

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and cable cars. It is virtually silent on LRV operator training and revenue service, which had not yet begun.

In Article 14 (page 32), the subject of LRV operations was left open for further departmental meeting and conferring in the following language:

"Muni Metro will issue a report to the Union on its proposed method of Muni Metro operation by October 1, 1979. Muni will meet and confer with the Union on any aspects of Muni Metro operations for which meet and confer is required under the Meyer-Miliias-Brown Act. Any impasse arising from the meet and confer process will be submitted to the impasse procedure by October 31, 1979 with instructions to the mediator to recommend a solution no later than November 15, 1979.

"Any aspects of Muni Metro operations not subject to the meet and confer process may be discussed by Muni with the Union in this same time frame."

By ordinance, the Board of Supervisors has provided in Administrative Code Sec. 16.215(b):

" . . . If agreement is reached on matters not subject to approval by a determining body or official, the appropriate level of management and recognized employee organization shall jointly prepare a written memorandum of such agreement."

The first departmental MOU dated November 5, 1979 states that it is an " . . . interim agreement entered into to permit LRV training to take place while negotiations continue, and without prejudice to either party's position."

To train LRV operators, it was necessary to take operators off existing runs using other equipment. The first departmental MOU provided that any such operator was to receive the pay for his regular run or pay for 8 hours and 15

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minutes, computed to include the base rate, cost of living allowance, if any, 30 cents an hour pursuant to Section 13.3 of the MOU, and a night shift differential of 6-1/4%.

Section 13.3 of the master MOU provides for a 30¢ an hour payment to operators who are taken from their regular runs without their consent. The night shift differential is also provided under Section 4.3 of the master MOU.

The departmental MOU also indicates that the Union was agreeing to something less than it claimed to be proper - 16-2/3% over the base rate plus cost of living, but including night shift differential.

The first departmental MOU, thus appears not to contradict the master MOU, but to have been negotiated only with respect to LRV training and operations and not to have exceeded the authority conferred by Article 14. Furthermore, the subject matter contained in both Article 14 and the first departmental MOU is solely within the discretion of the PUC.

Not all working conditions are included in actions of the Board of Supervisors. There are a myriad of customs in all departments that can be deemed to be working conditions, such as who sits near the window, priorities in assignment of department vehicles, times for coffee breaks, if any, and recovery and/or rest times between trips on Muni lines. The list of examples could be expanded indefinitely. The board and various unions in negotiating MOU's negotiate and state only those that have become issues between the Board of Supervisors and employee representatives, pursuant to the charter's division of authority. Thus, in answer to your first question, the working conditions which are subject to Charter Sec. 8.404, are only those that are not granted to the PUC, such as holidays, normal hours of employment, premium rates, allowances, etc. Working conditions such as scheduling, seniority, discipline and days-off are generally within the exclusive negotiating authority of the PUC. There, the Board of Supervisors ratifies the MOU as to these matters within its jurisdiction and the PUC as to working conditions within its management powers.

The second departmental MOU dated December 3, 1979 superseded the first, and provided generally, for the start up

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of LRV revenue service, a procedure for selecting, in accordance with seniority, two schedules, or runs, for each operator, one covering LRV operation, and the other covering operation of conventional equipment, (necessary because the exact date of start-up of LRV service, was not known with certainty). None of those matters were covered in the master MOU, and all appear to be within the authority of the PUC, recognized in Administrative Code Sec. 16.215(b) and deferred for further negotiations by article 14 of the master MOU.

Your second question must be intended to refer only to working conditions as rates of pay in the present instance were fixed prior to August 25. Working conditions relative to training and start-up of LRV operations were not fixed, but as has been previously stated, were deferred by the department and the union for future negotiations, rather than precipitating a crisis in August over operation of the entire Municipal Railway because of inability at that time to reach agreement on LRV service.

Your third question has been substantially answered already. The LRV start-up provisions covered in the two departmental MOUs were expressly not dealt with in the Master MOU, and were left to further departmental negotiation by Article 14. The subject of LRV start-up having been deferred to the department in the master MOU, there was no necessity for a re-opener clause.

Your fourth question inquires whether the departmental MOUs replaced prior agreements in whole or in part. Referring to the earlier part of this discussion, the master MOU expressly deferred LRV training and start-up to the department for determination with the union. Agreement was reached on such matters relating to the LRV. The two subsequent departmental MOUs related solely to that subject matter, and in effect replaced a non-agreement, rather than an agreement, in the master MOU.

Your fifth question inquires whether the departmental MOU's are deficient because they lack signatures of the Mayor, the President of the Board, and the Director of Employee Relations. The authority of the PUC to determine working conditions for LRV operation has been discussed. The departmental MOU's did not go beyond the conditions necessary

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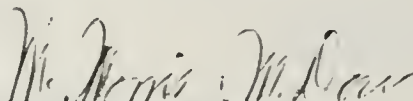
October 9, 1980

for training and start-up of LRV service. The departmental MOUs, being within the ambit of the charter delegated authority, are not invalid because of the reasons suggested.

You are so advised.

Very truly yours,

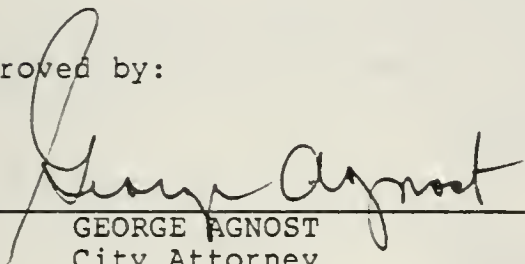
By



MCMORRIS M. DOW

Utilities General Counsel

Approved by:



GEORGE AGNOST
City Attorney

MMD:mg

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George Agnost,
City Attorney

October 31, 1980

OPINION NO. 80-66

SUBJECT: Peace Officer Status of Patrol Special Officers

REQUESTED BY: Cornelius P. Murphy
Chief of Police

DOCUMENTS DEPT.

PREPARED BY: John H. Cummings
Raymond N. Erlach
Deputy City Attorneys

NOV 4 1980

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Do Patrol Special Police Officers of the City and County of San Francisco have peace officer status?

CONCLUSION

Yes.

INTRODUCTION

San Francisco Patrol Special Police Officers are peace officers with full police power within the borders of the City and County of San Francisco. This is a result of the application of the California State Constitution, Article XI, the Charter of the City and County of San Francisco Sections 3.530 and 3.536, and Penal Code Sections 830.1 and 830.6(a).

CONSTITUTIONAL AUTHORITY

The police power resides in the people of the State. Such power has been directly granted by the people of the state to chartered municipalities by the provisions of the state Constitution. Ex Parte Braun (1903) 141 Cal. 204 and West Coast Advertising v. City and County of San Francisco (1939) 14 Cal.2d 516.

Article XI, Section 3(a) of the California Constitution provides:

"For its own government a county or city may adopt a charter. . . . The provisions of a charter are the law of the state and have the force and effect of legislative enactments."

Article XI, Section 5(b) provides:

"It shall be competent in all city charters to provide . . . for: (1) the constitution, regulation, and government of a city police force"

and Section (4)

"plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

The Charter of the City and County of San Francisco, then, is the authority by which plenary power is delegated to the City and County to determine the membership of the City's municipal police force. Only by virtue of charter authority can police status be conferred upon municipal employees. Therefore, exactly who is or is not a peace officer¹ in San Francisco is determined by the provisions of the Charter, and the actions of the Police Commission pursuant thereto.

Under Section 3.530 of the Charter, the Police Commission has been delegated authority to appoint and manage the San Francisco Police Department. Under Section 3.536 the Police Commission is empowered to appoint "Patrol Special Police Officers." The unequivocal use of both the words "Police" and "officers", singly and in conjunction, in describing this position in the Police Department is a clear manifestation of the intent of the framers of the Charter to invest Patrol Special Police Officers with police power, that is to say with peace officer status.

¹ A "peace officer" is a member of a recognized government unit charged with the duty of enforcing the laws of this state. 27 Ops. Atty. Gen. 213 at 214.

Since the Charter does not restrict the power of the Police Commission to grant police officer status to Patrol Special Police Officers, such appointment is lawful. The authority to so appoint is inherent in the grant of plenary power of Article XI, Sections 3(a) and 4 of the California Constitution. An examination of the Manual of Rules and Procedures, Resolution No. 308-70, adopted by the Police Commission on September 28, 1970, unequivocally establishes that police power and peace officer status have been invested in Patrol Special Police Officers. In Section 1.11 of the manual, the Patrol Special Police Officer is made a "member" of the San Francisco Police Department (see Footnote 1). In Section 2.01 subd. .5, the manual confers on Patrol Special officers the "power and duty" to "enforce all Penal Laws and Ordinances." This is the unequivocal conferral of police power and peace officer status upon Patrol Special Officers by the Police Commission. As stated in 27 Ops. Atty. Gen. 213, a peace officer is a member of a recognized government unit charged with the duty of enforcing the laws of the state. Hence, the Patrol Special Police Officer is a peace officer under the Attorney General's definition.

STATUTORY AUTHORITY

The statutory basis for the grant of "peace officer" status to Patrol Special Police Officers can be found in Penal Code Sections 830.1 and 830.6(a) and the Charter of the City and County of San Francisco.

Penal Code §830.1 provides:

"Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, any police of a district authorized by statute to maintain a police department, any marshall or deputy marshall of a municipal court, any constable paid as such, of a judicial district . . . is a peace officer." (Emphasis added.)

Penal Code §830.6(a) provides;

"Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxillary sheriff or city policeman, a deputy sheriff, or a reserve police officer of a

October 31, 1980

regional park district, and is assigned specific police functions by such authority, such person is a peace officer; provided, such person qualifies as set forth in Section 832.6 (training requirements), and provided further, that the authority of such a person as a peace officer shall extend only for the duration of such specific assignment." (Emphasis added.)

Further, Black's Law Dictionary, Rev. 4th Ed., 1968, West Publishing Co., defines "Police Officer" as follows:

"POLICE OFFICER. One of the staff of men employed in cities and towns to enforce the municipal police, i.e., the laws and ordinances for preserving the peace and good order of the community. Otherwise called 'policeman.'" (Id., p. 1317).

In effect, Black's Law Dictionary defines a police officer and a policeman as persons employed to enforce the penal laws and ordinances of a municipality. Under the Charter and the regulations of the Police Commission, Patrol Special officers are employed to perform exactly that function. Hence, Patrol Special Police Officers are "policemen" and therefore are peace officers under the language of Penal Code Sections 830.1 and 830.6, analyzed below.

Pursuant to the charter of the City and County of San Francisco, Section 3.536;

"The Police Commission may appoint patrol special officers and for cause may suspend or dismiss said patrol special police officers after a hearing on charges duly filed with the commission . . ."

The case of Maggi v. Pompa, 105 Cal.App. 496 held that since patrol special officers are appointed, controlled and supervised by public authority they are public officers, and when performing required duties they act as police officers.

Further, San Francisco Charter Section 3.536 specifically retains in the Police Commission the power to discipline for misfeasance any act of the Patrol Special Police Officers they empower. This retained power is an

element of control and supervision that supercedes and is independent of any relationship between Patrol Special Police Officers and their private employers. Since the Patrol Special officer is answerable to the Police Commission for any violation of his public duties (as set forth in Rule 2.01 of the Manual, below), he is distinct from a private security guard who has no public duty and is not so answerable. The extent of this control indicates the public character of the Patrol Special officer's position.

The San Francisco Police Commission, acting as the proper authority enumerated in Penal Code §830.6(a), adopted the Rules and Procedures for Patrol Special Officers and Assistant Patrol Special Officers at their meeting of September 28, 1970. The rules became effective on October 1, 1970.

The Signification of Words section of the Manual of Rules and Procedures defines the word "members" as, "the members and employees of the Police Department."

Rule 1.11 of the Manual states, "A member shall include Patrol Special Police Officers and Assistants to Patrol Special Police Officers, who shall be subject to the following rules and procedures."

In the Duties and Responsibilities section of the Manual, rule 2.01 states, "The Police Department and its members shall have the power and it is their duty to:

1. Prevent crime.
2. Protect life and property.
3. Detect and arrest offenders.
4. Preserve the public peace.
5. Enforce all penal laws and ordinances."

Thus, the Manual does not set forth the mere regulation of a local industry but establishes an investiture of the powers and duties of public office in the Patrol Special Police Officer. The Manual is a clear pronouncement of the Police Commission's intent to create police officers within the plain and ordinary meaning of those words. (See Black's Law Dictionary "Police Officer", supra; and 27 Ops. Atty. Gen. 213, supra).

In summary, the statutory grant of peace officer status, specified in Penal Code §§830.1 and 830.6(a), to "any qualified

person appointed by the proper authority", as well as any "policeman of a city", is the statutory basis for the power exercised by the Police Commission.

The Police Commission has the power to appoint Patrol Special Police Officers and to control them. The control is exercised through the Manual of Rules and Procedures administered by the Chief of Police.

Since the control and supervision exercised by the Police Commission and the Chief of Police has been shown to be the same or substantially the same as that exercised over regular police officers, then Patrol Special Police Officers must be considered to possess the powers of a policeman of the city. These powers are the powers of a "peace officer" (see Penal Code §830.1).

If under the Charter a Patrol Special is a policeman then a Patrol Special is a peace officer pursuant to Penal Code §830.1

Pursuant to Section 832 of the Penal Code the Police Department is under a mandatory duty to provide peace officer training to Patrol Special officers in accordance with the standards set by the Peace Officer Standards and Training (POST) Commission of the State of California. Since Patrol Special officers are also cognizable under Section 830.6(a), they are likewise subject to the requirement of training to POST Commission standards.

EFFECT OF PRIVATE PAYMENT TO PATROL SPECIALS

The private payment of off-duty peace officers has in recently decided cases reduced their powers and duties to those of an ordinary citizen. People v. Corey (1978) 21 Cal.3d 738, and Cervantez v. J. C. Penney (1979) 24 Cal.3d 579.² Since these decisions concern off-duty police officers and we are herein concerned only with the status of on-duty Patrol Special Police Officers, the premises are factually distinct. A distinction in law is found in the Cervantez

² In Corey and Cervantez the State Supreme Court decided that off duty city police officers do not have peace officer status while they are employed as private security guards.

opinion itself. The reasoning behind both the Corey and Cervantez decisions was this:

"Our holding (in Corey) was based on a number of statutory provisions which in our view evinced a legislative policy against according peace officer status and protection to actions of off duty police officers performed within the course and scope of their private employment as security guards. These provisions include the Private Investigator and Adjustor Act (PIAA) (Bus. & Prof. Code, §7500 et seq.) and Penal Code Section 70." (24 Cal.3d 587).

First of all, the PIAA, in Section 7522(e) Bus. & Prof. Code, specifically exempts Patrol Special Police Officers from the terms of its act. Secondly, the PIAA has been found to be a comprehensive act regulating private security forces so that the public will not confuse them with local law enforcement officers. This is clearly stated in the Cervantez decision which goes on to state that private security forces cannot

"'use a title, or wear a uniform, or use an insignia, or use an identification card, or make any statement with the intent to give an impression that he is connected in any way with . . . any policital subdivision of a state government.'" (Bus. & Prof. Code, §7538 subd. (3))." (24 Cal.3d 587)

In this regard, it is of particular significance that Patrol Special Police Officers are required to do each of these things in accordance with the Manual of Rules and Procedures adopted by the Police Commission. Patrol Special Officers are established members of the San Francisco Police Department (Manual, 1.11), they wear the uniform of the San Francisco Police Department with an extra stripe (Manual, 7.223), they wear the insignia of the San Francisco Police Department with the additional words "Patrol Special" at the top, they have a San Francisco Police Department Identification Card, (Manual, 7.09.11) and they are under the command of the Police Commission, the Chief of Police, and the hierarchy of the San Francisco Police Department to whom they must answer, (Manual, 3.403). San Francisco Patrol Special Officers are required to display a police star (Manual, 7.13). Thus, by operation of the Manual, the Patrol Special Police Officer is given all the

outward indices of a police officer. This is a further manifestation of the intent of the Police Commission to grant police power and peace officer status to such personnel. The exemption of such personnel by the legislature from the PIAA evinces a clear legislative policy permitting the granting of peace officer status to Patrol Special Officers.

The second enactment discussed in Cervantez is Penal Code Section 70, which states:

"Every executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who knowingly asks, receives or agrees to receive any emolument, gratuity or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor. . . ."

A careful reading of Section 70 indicates that it is concerned with gratuities or special payments and not with salary and compensation as authorized by local statutory authority. Penal Code §70 expressly provides that other (private) payment of special officers may be authorized by law.

The San Francisco Charter, the controlling law herein, authorizes the payment of patrol specials by the private sector for official acts, in that the Charter implicitly permits such private contractual payments by granting private ownership of patrol territory to those officers designated Patrol Special Police Officers by the Police Commission. A fair reading of Penal Code §70 is that the section does not apply to the private remuneration for the doing of official acts by Patrol Special Police Officers since these services have been, to use the words of Penal Code §70, "authorized by law."

It is clear that by its express provisions, Penal Code Section 70 does not apply to the on-duty compensation through private sources of Patrol Special officers since such compensation is authorized by the Charter, and the rules and regulations of the Police Commission and the Police Department. (See Charter Section 3.536). In any case, as more particularly set forth below, the compensation of on-duty Patrol Special officers is a municipal affair and is well within the plenary authority of a municipality to regulate pursuant to Article XI of the California Constitution.

PAYMENT OF CITY POLICEMEN IS A MUNICIPAL AFFAIR

As stated above, both Penal Code Sections 70 and 830.1 cannot be given a valid constitutional construction if interpreted in such a manner as to deny peace officer status to Patrol Special Officers. The Legislature cannot, by enactments, take police power away from any group or category of persons which has been delegated this power by operation of the state Constitution.

While it is true that municipal powers may not conflict with the general laws of the state where the legislature has constitutionally preempted the field, "Bearing in mind that San Francisco is acting under a charter, the general laws . . . have no application in the case at bar. (Citations omitted.)" Shewbridge v. The Police Commission of the City and County of San Francisco (1944) 64 Cal.App.2d 787, at 791. And as stated in Lossman v. City of Stockton (1935) 6 Cal.App.2d 324, "There is no question but what the regulation of the organization and maintenance of a police or fire department by a chartered city is a municipal affair, as, for instance, such matters as relate to the fixing of compensation . . . (citations omitted)" Id., 6 Cal.App.2d 332. Thus, the field of how the police personnel of a chartered city will be paid, and what he shall be called, is not amenable to general statewide legislation. Jurisdiction over these areas is conferred upon chartered municipalities by Article XI, State Constitution, supra, and case law has established that this area of concern is a municipal affair.

In a case concerning the power of a municipality to license and tax, Ex Parte Braun (1903) 141 Cal. 204, at 211-212, the court articulated the rule for discerning "municipal affairs":

"It is of course true that the local power of taxation, like all other local powers, must have its origin in a grant by the state, and that it may at all times be controlled by the sovereign power. But it does not follow that the legislative department of the state may so control it. In the absence of constitutional provisions relating to the subject, the legislative department would necessarily have unlimited sway, and could, for the state, confer, modify, or withdraw the power and prescribe such regulations

as it saw fit for its exercise. The state Constitution is, however, the highest expression of the will of the people of the state, and so far as it speaks, represents the state. . . . The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature. There is no enactment of the legislature purporting to vest such authority in such cities. Such power has been directly granted by the people of the state by the provisions of the state Constitution."

See also West Coast Advertising v. City and County of San Francisco, (1939) 14 Cal.2d 516 at 524. The authority to create Patrol Special Police Officers and to grant to them peace officer status concerns a power "given in the constitutional method by special charter, and not by direct legislative enactment, it can be withdrawn only by amendment to the charter in the manner provided by the constitution. It is only when the local power is not conferred by the state constitution, that legislative enactment is essential to its existence (citation omitted), or is of adequate force to withdraw it." Ex Parte Braun 141 Cal. 211.

The analyses of Braun, supra, and West Coast v. San Francisco, supra, apply equally to the power to appoint police as they would to the power of licensing and taxation which these cases upheld despite contrary enactments by the legislature by virtue of a direct and specific constitutional grant of authority to chartered municipalities. As in these cases, the charter of the city controls the point of law. It is the Charter of San Francisco, therefore, which determines which personnel enjoy the powers and duties of a city policeman, and therefore are peace officers. Accordingly, action by the state Legislature does not restrict a municipal charter in determining the titles, authority, duties, privileges, or manner of compensation of city policemen. The rule of construction which applies herein is that absent a valid statewide concern the general laws are inapplicable to the chartered cities. Payment of municipal employees has been held to be a purely local affair.

In the recent case of Sonoma County Organization of Public Employees v. Sonoma County, and related actions, (1979) 23 Cal.3d 296, the California Supreme Court invalidated two

enactments of the legislature (Government Code Sections 16280 and 16280.5) restricting the compensation of municipal employees. The court found that the plenary authority granted municipalities by Article XI Sections 4 and 5 of the California Constitution precluded any legislation on the subject of payment without a valid statewide concern. With citations reaching back to 1899, the court ruled "that the salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws . . . that the determination of wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern." (23 Cal.3d 317).

Under this holding, the payment of a police officer in San Francisco is a municipal affair, and the general laws are not controlling. Thus, because the Charter provides for the private payment of Patrol Special Police Officers by the several citizens who have contracted for his services, that manner of compensation becomes the law of the state itself. Sonoma County Organization of Public Employees, supra.

CONCLUSION

The San Francisco Patrol Special Police Officer is a peace officer pursuant to both the constitutional and statutory analysis.

The Police Commission, acting pursuant to Charter authority emanating from the constitutional grant of power, has designated Patrol Special Police Officers to be, and they are, policemen of the City and County of San Francisco. As such they are peace officers.

Statutorily Patrol Special Police Officers derive their authority as peace officers from Penal Code Sections 830.1 and 830.6(a). Both of these sections grant peace officer status to city police. The Police Commission, through its Charter power, has designated Patrol Special Police Officers as members of the San Francisco Police Department, thus, peace officers.

Further, the question of whether or not Patrol Special Police Officers are peace officers has been passed upon by the predecessors of this City Attorney in two previous opinions. In each case, this office has held that Patrol Special Police

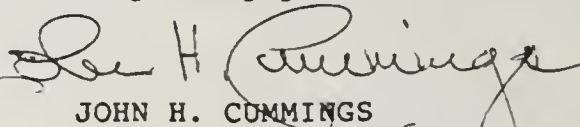
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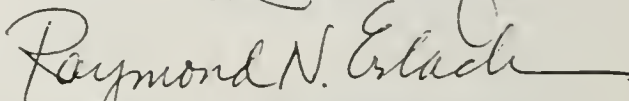
October 31, 1980

Officers are peace officers under the law (see City Attorney Opinions 66-73-A and 69-55). This office reaffirms those opinions and their conclusion.

Very truly yours,

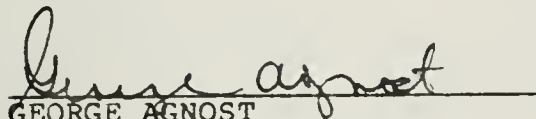


JOHN H. CUMMINGS



RAYMOND N. ERLACH
Deputy City Attorneys

APPROVED:



GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

November 10, 1980

OPINION NO. 80-67

SUBJECT: Election of President of the Board of Supervisors

REQUESTED BY: Honorable John L. Molinari
President, Board of Supervisors

DOCUMENTS DEPT.

PREPARED BY: Thomas A. Toomey, Jr.
Chief Deputy City Attorney
Burk E. Delventhal
Deputy City Attorney

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QUESTION PRESENTED

Does a Charter amendment, altering the method for electing supervisors so that they are elected in November of even-numbered years, taking office on January 8 of odd-numbered years, have any effect on the term of office of the president of the board of supervisors who, pursuant to San Francisco Charter Section 2.202, is elected on January 8 of even-numbered years.

CONCLUSION

No.

ANALYSIS

San Francisco Charter Section 2.202 provides:

"The supervisors constituting the new board shall, on January 8, 1932, and every second year thereafter, elect one of their number as president of the board for a two-year term. The president shall preside at all meetings, shall appoint all standing and special committees of the board and shall have such other powers and duties as the supervisors may provide."

Since the provisions of Section 2.202 were adopted in 1931, and every two years thereafter until 1980, supervisors were elected in odd-numbered years, taking office at 12:00 noon on January 8 of even-numbered years. Thereafter they elected one of their number to serve as president for the two year term specified in San Francisco Charter Section 2.202.

The date of electing supervisors had not changed, notwithstanding amendments replacing the at-large system with the district system. On August 19, 1980, the people amended the San Francisco Charter restoring the at-large system. That amendment called for the first election of at-large supervisors in November of 1980. These supervisors take office on January 8, 1981. The August 19, 1980 amendment does not mention the provisions of San Francisco Charter Section 2.202.

Pursuant to Section 2.202 the San Francisco supervisors met on January 8, 1980 and elected supervisor Molinari to serve as president of the board for the two year term specified in that section.

You have asked whether the recent amendment to the Charter changing the time at which, and the method by which supervisors shall be elected has any effect on your term as president of the board of supervisors.

The subject matter of the initiative measure which was before the voters on August 19, is different from the subject matter dealt with in Section 2.202. The August 19 initiative amendment deals with the manner in which, the times at which, and the terms for which supervisors shall be elected, while Section 2.202 deals with the method by which, the time at which, and the term for which the president of the board of supervisors shall be elected by the other members of the board.

Since San Francisco Charter Section 2.202 was not amended or deleted in the August 19, 1980 election, it is still in full force and effect. The language of Section 2.202 is clear, certain and unambiguous. There is abundant authority for the cardinal rule of statutory construction that where the language of a statute is clear, the courts must follow that language. This rule is clearly stated by the court in Woodmansee v. Lowery (1959) 167 Cal.App.2nd 645 at 652:

" While it is true that where a statute is susceptible to [sic] constructions, one consistent with reason and the other leading to absurd consequences, the former is to be adopted, it is equally true that where the meaning of a statute is clear, courts 'must follow the language used and give to its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even

if it appears probable that a different object was in the mind of the legislature.' [Citation omitted.] Where 'the language permits only one construction, the intent of the legislature in enacting a statute is to be gathered from the words and language employed, read as a whole. An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intent not expressed therein.' [Citation omitted.]"

An application of this principle to the instant case compels the conclusion that under San Francisco Charter Section 2.202 the president of the board of supervisors is elected by the board for a two year term on January 8th of every even-numbered year. Since 1932 this election of the president of the board has immediately followed an election by the voters of members of the board, and it therefore appears that it was the original intent of the drafters of this section that the election of the president immediately follows the general election of supervisors. Section 2.202 was synchronized with the other sections of the Charter governing the methods and terms of election of supervisors. This synchronization, however, was eliminated by the August 19, 1980, election which changed the year in which voters elected the supervisors but did not change the time or method of electing the president of the board. Had the voters intended the August 19, 1980, election to change the time of electing a president of the board they could have amended Section 2.202. No such amendment was proposed or adopted.

Without regard to what would have been proposed and approved had the voters considered the problem, the fact remains that Section 2.202 was left unchanged. Since its terms are clear and unambiguous, there is no reason for interpretation or construction of its unequivocal statement that the president of the board shall be elected in January, 1932 and every two years thereafter.

The only other question is whether Section 2.202 has been repealed or superseded by implication. Repeals by implication are disfavored.

November 10, 1980

". . .[T]here is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the latter provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together."

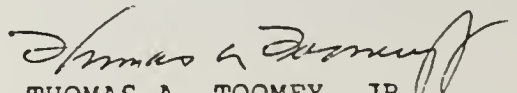
Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1968) 263 Cal.App.2nd 41 at 54. See also Fuentes v. Workers' Compensation Appeals Board (1976) 16 Cal.3rd 1.

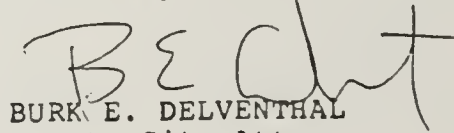
CONCLUSION

It is therefore my conclusion that Charter Section 2.202 still governs the time of election and term of office of the president of the board. It has not been repealed or superseded, and it must be interpreted in accordance with the plain meaning of its language. Since Supervisor Molinari was elected on January 8, 1980 for a two-year term, the next election under Section 2.202 will take place on January 8, 1982 unless the office of president of the board is vacated before that date.

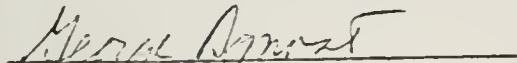
Very truly yours,

GEORGE AGNOST
City Attorney


THOMAS A. TOOMEY, JR.
Chief Deputy City Attorney


BURK E. DELVENTHAL
Deputy City Attorney

APPROVED:


City Attorney

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George Agnost,
City Attorney

DOCUMENTS DEPT.

November 13, 1980

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OPINION NO. 80-68

SUBJECT: Payment of Public Funds for Obligations Omitted
from Written Contract by Mistake.

REQUESTED BY: Commission on the Aging

PREPARED BY: Julian E. Hultgren
Deputy City Attorney

QUESTIONS PRESENTED

1. Is the City and County of San Francisco legally obligated to make payment to a private agency contractor for services performed at the request of the Commission on the Aging when the services were not included in any of the written contracts with the agency, but funds for the services were authorized by the Commission on the Aging and the Commission was authorized, by Resolution of the Board of Supervisors, to "enter into contract and amend current agreements" to provide for such services by the agency?

2. Under such circumstances, is the Controller obligated, if unencumbered funds are available for such payment, to certify to such fact even though the services have been performed prior to such certification?

CONCLUSIONS

1. The City and County of San Francisco is legally obligated to make such payment because a court could be expected to find that the services were omitted from a subsequent written contract by mistake and, on that basis, would reform the contract to include the omitted services.

2. The Controller is so obligated.

ANALYSIS

Your basic question is whether the City and County of San Francisco (herein called "City") is legally obligated to pay \$10,000.00 requested by the United Jewish Community Center

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(herein called "Center") for a portion of the costs of installing an elevator to serve the needs of senior persons using the Center. A summary of the facts is necessary before analyzing the legal conclusion to this question.

A written contract for nutritional services (Contract #70245), with an effective date of July 31, 1977, was made between the City and the Center, under which the City agreed to pay \$16,576 for certain nutritional services for senior persons to be performed by the Center. (These funds would be repaid to the City from Title III funds, a federally funded program administered by the California State Department of Aging.)

On April 5, 1978, the Commission on the Aging met to consider, among other things, recommendations of its Administrative Committee for use of "carry-over" Title III funds from the prior fiscal year (which had ended 6/30/77). Among the recommendations that were approved was the following:

"2) United Jewish Community Center - \$10,000

This amount will be specifically earmarked to be added to the award of Parking Tax Funds previously approved by the Commission and will bring the total amount up to the \$30,000 needed to install a much needed elevator in their center serving Seniors." (San Francisco Commission on the Aging, Minutes, April 5, 1978.)

On June 26, 1978, the Board of Supervisors adopted Resolution No. 532-78 which provided, in part, as follows:

"BE IT RESOLVED, That this Board of Supervisors does hereby authorize the San Francisco Commission on the Aging to enter into contract and amend current agreements for the purpose of providing direct service to the seniors of San Francisco with the agencies listed as follows:

<u>AGENCY</u>	<u>CURRENT AMOUNT</u>	<u>CONTRACT AMENDMENTS</u>
. . .		
United Jewish Community Center	\$16,576.00	\$10,000.00
. . .		

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"BE IT FURTHER RESOLVED, That this shall not be construed to obligate City & County of San Francisco funds for said services beyond the period covered by this grant or funds from the California Department of Aging, or other non-local funding."

Thereafter, the following occurred:

1. On June 30, 1978, a contract was made between the City and the Center under which the City obligated itself to pay \$26,000 from Parking Tax Funds. Of this sum, \$20,000 was designated for payment of a portion of the costs of installing an elevator. (The additional \$10,000 of Title III funds authorized by the Commission on Aging and the Board of Supervisors was not mentioned in this contract. This contract was later certified by the Controller and the entire \$26,000 has been paid out.)

2. By two letters to the Commission on the Aging, dated November 1, 1978, the California Department of Aging: (1) approved shifting of the "carry-over" Title III funds to contract services, and (2) authorized payment from those funds of \$10,000 to the Center.

3. By letter to the Commission on the Aging, dated February 22, 1979, the Center inquired about "the status of the \$10,000 that we are to receive toward the elevator."

4. By a statement, dated June 15, 1979, and addressed to the Center, Anderson Constructors billed for payment of \$10,000 for work on the elevator installation. The Center requested these funds from the Commission on the Aging but, because the question was raised regarding existence of a legal obligation of the City to pay, the Center has not been paid.

On the basis of these facts, does the City have a legally enforceable obligation to pay the \$10,000 requested by the Center?

When parties come to an agreement but, through fraud or mutual mistake, the written contract does not correctly state their agreement, the contract may be reformed to correctly express that agreement, provided that doing so will not prejudice the rights of third parties, acquired in good faith

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and for value. This remedy of reformation is codified in C.C.P. Sec. 3399. Unless fraud is involved, the mistake must be mutual and the party asserting it has the burden of proving that fact by clear and convincing evidence. " . . . [I]f the mistake is mutual the court has power to reform the contract to make it express the true intent of the parties." (Martinelli v. Gabriel (1951) 103 CA2d 818.)

Furthermore, C.C.P. Section 3402 provides that:

"A contract may be first revised and then specifically enforced."

Therefore, a contract may be revised (i.e. reformed) and specifically enforced in the same action. In Tomas v. Vaughn (1944) 63 CA2d 188, the court affirmed a judgment which reformed a contract for sale of an automobile and also awarded damages to plaintiff for defendant's fraud.

A municipal contract is subject to reformation, provided the required elements are present.

"All the remedies available to contracting parties under the laws are available to parties to a contract of a municipal corporation . . ."
(10 McQuillin, Municipal Corporations, §§ 29.124 and 29.123a.)

See also, Mings v. Compton City School District (1933) 129 CA 413, 418-419, where the court discussed the fact that the school district had a right to obtain reformation of a deed.

In regard to the \$10,000 of Title III "carry-over" funds involved in your question, there is no evidence of an express written contract for payment of those funds to the Center. However, there is evidence that would support a judgment reforming the contract made June 30, 1978, to include a provision for such payment.

The intention of the parties is clear: \$10,000 of the "carry-over" Title III funds was to be added to the \$20,000 of Parking Funds previously approved, the total of \$30,000 being the amount needed to install the elevator. (See Commission on the Aging Minutes, April 5, 1978, supra.) This intention was confirmed, and execution of a contract for this purpose

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authorized, by the Board of Supervisor's Resolution No. 532-78, adopted June 26, 1978. Four days thereafter, on June 30, 1978, a contract was entered between the City and the Center which, among other things, included the City's agreement to pay \$20,000 from Parking Tax Funds toward costs of the elevator installation. It would be logical to conclude that the intention of the parties was that this contract, which dealt with funds for the elevator installation, would also include a provision for the additional \$10,000 from Title III funds, earmarked and approved for the same purpose, but that such a provision was omitted through mutual mistake. A court could reasonably determine that this was the fact and, on that basis, decree that the June 30, 1978 contract be reformed to include a provision amending the prior year's agreement (i.e. contract of July 31, 1977; amount of \$16,576) to increase the contract obligation by \$10,000, the increase to be paid from Title III "carry-over" funds and to be used for elevator installation costs. As so reformed, the City would be legally obligated to pay the additional \$10,000 to the Center and that obligation could be enforced by a court in the same reformation action.

The second part of your question is whether the Controller is obligated to make the certification required under Charter Section 6.302 when, except for his certification, the obligation has already been incurred and the services have been performed.

Charter Section 6.302 provides, in relevant part:

"No obligation involving the expenditure of money shall be incurred or authorized by any officer, employee, board or commission of the City and County unless the controller first certify that there is a valid appropriation from which the expenditure may be made, and that sufficient unencumbered funds are available in the treasury to the credit of such appropriation to pay the amount of such expenditure when it becomes due and payable."

This language suggests that obligations involving the expenditure of money may not be incurred or authorized unless the Controller's certification has been previously obtained. However, as was discussed in detail in City Attorney Opinion

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80-7, it was held in Flora Crane Service v. Ross (1964) 61 Cal.2d 199, that absence of prior certification by the Controller would not prevent formation of a valid contract. The court concluded that Charter Section 86 (a predecessor to present Section 6.302) raises an implied covenant by the City to submit the matter to the Controller and creates a duty on the part of the Controller to "determine whether the necessary funds are available and, if so, to make the appropriate certification." That duty is a ministerial one, "for the controller is required only to determine as a matter of fact whether 'there is' such an appropriation and whether such funds 'are available' in the treasury." (Flora Crane Service v. Ross, supra, 204.)

In the Flora Crane case, the fact that the obligation had already been "incurred" did not excuse the Controller from performing his duty to determine the availability of funds and, if available, to so certify. The court, at page 207, reasoned that the Controller could not make his certification until the precise amount of the proposed contract had been established, but that thereafter (even though the obligation by then had been "incurred") he had a clear ministerial duty "to determine whether the necessary funds were available and, if they were, to so certify the fact."

The two-step duty of the Controller is, first, to determine the true facts and, second, to certify to availability of necessary funds only if that is in fact the case. If the contractor performs under the contract without prior certification and, when certification is thereafter sought, there are no longer sufficient unencumbered funds available to the credit of a valid appropriation from which to pay him, the Controller necessarily cannot certify and the City is under no contractual liability for the services performed.

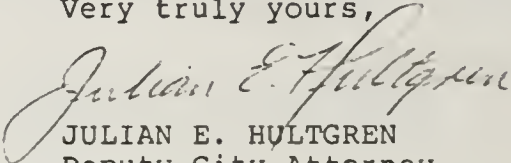
In summary, under the facts here involved a court could be expected to reform the June 30 contract to include the additional \$10,000 of Title III funds. As so reformed, the contract would legally obligate the City to pay the \$10,000 requested by the Center, provided that appropriated funds are

November 13, 1980

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available for payment. The Controller must, therefore, determine whether the necessary funds are available and, if so, certify to that fact.

Very truly yours,


JULIAN E. HULTGREN
Deputy City Attorney

APPROVED:



GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

November 14, 1980

OPINION NO. 80-69

DOCUMENTS DEPT.

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SUBJECT: Legality of Transportation Charge
Differential Based on Residence

REQUESTED BY: QUENTIN L. KOPP
Member of the Board of Supervisors

PREPARED BY: McMORRIS M. DOW
Utilities General Counsel

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QUESTION PRESENTED

May BART charge a lower fare for San Francisco residents bound to or from the Daly City BART Station than for non-residents?

ANSWER

Yes.

ANALYSIS

Passengers riding BART between Daly City and any station within San Francisco on a regular fare basis pay 40¢ more than passengers riding to and from Balboa Park, the last station inside San Francisco. Regular fares between all San Francisco BART stations are the same - 50¢.

The 90-cent fare to and from any station in San Francisco and Daly City is presumably based on the fact that the Daly City Station is physically situated in a non-BART county, and serves as a station for many residents of a non-BART county. It also is an important station for many residents of San Francisco, who presently pay the same 90-cent fare as do residents of a non-BART county.

The enabling act for the Bay Area Rapid Transit District provides:

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"The rates and charges for service furnished pursuant to this part shall be fixed by a two-thirds vote of the board and shall be reasonable. Insofar as practicable, such rates shall be fixed so as to result in revenue which will:

- "(a) Pay the operating expenses of the district;
- "(b) Provide for repairs, maintenance, and depreciation of works owned or operated by the district;
- "(c) Provide for the purchase, lease or acquisition of rolling stock including provisions for interest, sinking funds, reserve funds, or other funds required for the payment of any obligations incurred by the district for the acquisition of rolling stock; and
- "(d) After making any current allocation of funds required for the foregoing purposes and by the terms of any indebtedness incurred under Articles 6 (commencing with Section 29240) and 7 (commencing with Section 29250) of Chapter 8 of this part, provide funds for any purpose the board deems necessary and desirable to carry out the purposes of this part." (Public Utilities Code Sec. 29038)

Examination of Public Utilities Code Sec. 29038 indicates a requirement that the rates be reasonable and, insofar as practicable, be at such a level as will cover the usual operating costs, depreciation, and service of the long term debt. The language is not unlike that found in Charter Section 3.598 relating to City's own utilities wherein the rates are to be so fixed as to cover all expenses of every kind and nature incident to operation and maintenance, together with the necessary debt service. Both agencies may operate with fare levels that require an infusion of funds from other sources than passenger revenues.

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Elemental utility law states that a public utility, whether investor-owned or municipally-owned, may not demand a different rate or charge from various persons for an identical kind of service under identical conditions. Any difference in charge must be based on difference in service (12 McQuillan, Municipal Corporations Sec. 34.99). It has, moreover been specifically held that a statute authorizing lower street car fares for residents than for non-residents is unconstitutional (State v. Omaha and Council Bluff's Railway Co. (1901) - Iowa 84 N.W. 983). This case, however, can be distinguished because it does not appear from the facts stated therein that residents were subsidizing the traction company through taxation.

Assuming that a non-resident pays little or no tax in San Francisco, and lives in a non-BART county, and that a resident pays substantial taxes in this City, both to the City and to BART, they do not receive identical service under identical conditions. If the transit fare is the same for both, the non-resident gets less expensive transportation than the resident, because the latter must also pay taxes to meet the cost of supplying the service. 1/

Although courts are inclined to protect zealously the interests of those who are served by a municipally-owned utility outside its boundaries, so that the lack of political control by the non-resident customers does not result in unreasonably high utility charges, as compared to the charges imposed on residents of the serving municipality (Lafayette v. Louisiana P & L Co. (1978) 435 U.S.389, 55 Led.2d 364, 98 S.Ct.1123), where there is a rational basis for a higher charge for service to non-residents than to residents, such higher charge is legally proper. Durant v. City of Beverly Hills (1940) 39 C.A.2d 133; and see County of Inyo v. Public Utilities Com. (1980) 26 Cal.3d 154).

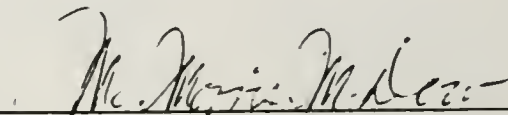
1/ BART levies a general property tax with a limit of 5 cents per hundred dollar valuation plus a sufficient additional amount to provide for debt service on general obligation bonds (P.U. Code Sections 29121, 29123). There is also a transactions and use tax in the amount of \$.005 levied in San Francisco, Alameda and Contra Costa Counties, the proceeds of which are allocated to BART, Muni, and AC Transit (P.U. Code Sec. 29142.2).

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You are therefore advised that the BART Board of Directors could establish a lower fare for residents than for non-residents of the BART District because of the tax support provided by the resident user. Whether such a fare differential is adopted is within the reasonable discretion of the BART Board of Directors.

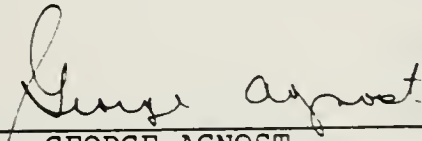
You are so advised.

Very truly yours,



McMORRIS M. DOW
Utilities General Counsel

APPROVED BY:



GEORGE AGNOST
City Attorney

MMD:mg

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 George Agnost,
City Attorney

November 14, 1980

OPINION NO. 80-70

SUBJECT: Review by Civil Service Commission of personal service contracts between third persons and the City and County of San Francisco

REQUESTED BY: JOHN J. WALSH
General Manager, Personnel
Civil Service Commission

DOCUMENTS DEPT.

PREPARED BY: MICHAEL C. KILLELEA
BURK E. DELVENTHAL
Deputy City Attorneys
HENRY L. HOLST
Legal Assistant

NOV 24 1980

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QUESTION PRESENTED

May the General Manager, Personnel adopt guidelines regarding which types of personal services contracts are subject to the Commission's jurisdiction and oversee, at an administrative level, the review of those contracts for the purpose of determining which contracts are subject to the Commission's jurisdiction?

CONCLUSION

Yes.

ANALYSIS

The State of California ("State") and the City and County of San Francisco ("City") both have Civil Service systems. Neither the San Francisco charter, however, nor the State Constitution explicitly regulates, limits, or proscribes the award of personal service contracts outside the civil service system. In view of this absence, the question has arisen, in part, whether the Civil Service Commission has jurisdiction to review and except personal services contracts from the operation of the City's civil service system?

It has jurisdiction to review such contracts and determine whether they may be excepted from the general civil service employment selection system. The courts have determined that the Civil Service Commission (both at the state and local levels) has the broad power to "protect the organic civil service mandate against dissolution." In this sense, "jurisdiction" and "power" are synonymous. Sea World Corp. v. Superior Court of San Diego County (1973) 34 Cal.App.3d 494, 500, 110 Cal.Rptr. 232, 236.

This function of the Civil Service Commission was explained in California State Employees' Association v. Williams (1970) 7 Cal.App. 3d 390, 397, 86 Cal. Rptr. 305, where the Court stated:

Article XXIV [of the State Constitution] and the San Francisco Charter call for comparable civil service coverage and both express the same underlying policy. The restriction on 'contracting out' does not stem from an express constitutional prohibition. Rather, it emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction. (State Comp. Ins. Fund v. Riley, supra, 9 Cal.2d at pp. 135-136.) (Emphasis added.)

Therefore, even though neither the Constitution and implementing State law, nor the City Charter, contains express prohibitions against "contracting out" personal services to third persons, both the State and the City have, by judicial construction, the implied power and jurisdiction necessary to review personal service contracts to prevent the systems' circumvention and destruction.

It, therefore, becomes important to understand how the civil service system might be circumvented or destroyed. The basic example involves third persons furnishing personal services to the State and the City, which services otherwise could have been and theretofore had been furnished through their respective civil service systems.

In construing provisions of the State Constitution, parallel to Section 8.300 of the Charter, the courts have held that the State must use its classified civil service system for the delivery of services to the State. Burum v. State Compensation Insurance Fund (1947) 30 Cal.2d 575, 582, 184 P.2d 505; California State Employees Association v. Williams, supra; State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126, 69 P.2d 985; Stockburger v. Riley (1937) 21 Cal.App.2d 165, 68

P.2d 471; California School Employees Association v. Willits Unified School District (1966) 243 Cal.App.2d 776, 52 Cal.Rptr.765; California School Employees Association v. Sequoia Union High School District (1969) 272 Cal.App.2d. 98, 77 Cal.Rptr. 187. The case of California State Employees' Association v. Williams, supra, applies the ruling set down in those cases to the provision of services to the City and County of San Francisco.

The line of demarcation between those services which must be provided by a government operating under a civil service system and those which may be rendered by private personal services contracts for delivery of services was succinctly articulated in State Compensation Insurance Fund v. Riley, supra. Construing a provision of the State Civil Service Act parallel to Charter Section 8.300, the court held, at 135, that the true test of legality of proposed personal service contracts is

. . . whether the services contracted for . . . are of such a nature that they could be performed by one selected under the provisions of civil service.

The Court, in the case of Kennedy v. Ross (1946) 28 Cal.2d 569, 170 P.2d 904, held that the same test applied to the City. The foregoing cases stand for the proposition that personal service contracts with both the City and the State are unlawful if the services contracted for could be performed by one selected under the provisions of their respective civil service systems.

If the services contracted for are not of such a nature that they can be performed by one selected under the respective civil service systems, such personal services contracts are prima facie lawful. Kennedy v. Ross, supra; California State Employees' Association v. Williams, supra.

And in California State Employees' Association v. Williams supra, the court held that where there is a new state function not previously conducted by any state agency which the legislature directs shall be contracted out, that function may be performed by individuals on a personal service contract without violating the constitutionally derived civil service system.

The next question becomes what official or agency determines whether such services can be performed by one selected under the civil service system. Although no court has specifically answered this question, this office has opined that the respective agencies in charge of enforcing the civil service laws make such determinations. (City Attorney Opinion No. 79-57, August 2, 1979.)

For example, in the case of California State Employees' Association v. Williams the Court said, at 400:

As we observed in our opinion, the decisions of the state Supreme Court have indicated the permissibility of service agreements when the work cannot be 'adequately or competently or satisfactorily' performed by civil service personnel. (Burum v. State Comp. Ins. Fund, 30 Cal.2d 575, 582 [184 P.2d 505]; see also State Comp. Ins. Fund v. Riley, 9 Cal.2d 126, 135 [69 P.2d 985, 111 A.L.R. 1503].) The Attorney General points out that the Department of General Services, State Personnel Board and State Controller have developed a set of criteria (really an elaboration of the above test) by which to measure the validity of service contracts.

The corresponding entity within the City is the Civil Service Commission, which is " . . . the employment and personnel department of the city and county" (Charter Section 3.661.) The people of the City have also authorized the Commission to adopt rules to carry out the civil service provisions of the charter " . . . and such other matters as are not in conflict . . . with the Charter." (Id.)

That the Commission must make a determination regarding whether a proposed personal services contract contemplates providing services to the City which should be provided through the civil service system becomes evident when one reviews San Francisco Charter Section 8.400(e), which provides in relevant part:

For the purpose of the verification of claims, bills, . . . shall be considered in the same manner as personal service items and shall be included on payrolls as approved by said principal executive or other officers, and shall be subject to examination and approval by the

secretary of the civil service commission and the controller in the same manner as payments for personal services. (Emphasis added.)

Furthermore, it is the general rule that an administrative agency may and must determine in the first instance whether it has jurisdiction. Anderson Lumber Co. v. Fletcher (1950) 228 Ind. 383, 89 N.E.2d 449.

It therefore must be concluded that the Commission must determine whether the work proposed to be performed can be "adequately or satisfactorily" performed by civil service personnel and that it may promulgate rules to facilitate the making of this determination.

Under Section 3.661 of the Charter, the Commission is empowered to:

. . . adopt rules to carry out the civil service provisions of this charter

Pursuant to this power, the Civil Service Commission has delegated general responsibility for administering the department to the General Manager. See Rule 3.04 which provides in relevant part that:

In the performance of all duties, the General Manager, Personnel, shall be responsible to the Commission. The duties of the General Manager, Personnel, shall be as follows:

a) Delegate duties where necessary and supervise and direct the work of all persons employed in the Personnel Department, or engaged in preparing, conducting, or scoring examinations.

* * *

e) Report to the Commission from time to time as directed concerning the details of the work of the Personnel Department.

* * *

g) Recommend to the Commission the appropriate classification of all positions in the Classified Service; maintain a schematic list of all classes in the Classification Plan; and prepare and maintain specifications for each class.

* * *

j) Perform all functions necessary for the proper implementation of these rules and the provisions of the Charter relating to Civil Service administration, and such additional duties as may be assigned by the Commission.

An integral part of the General Manager's duties involves the review and evaluation of proposed personal services contracts in order to determine whether they are subject to the jurisdiction of the Civil Service Commission.

Once the General Manager determines that a contract is beyond the Commission's jurisdiction, it may be returned to the department without further review by either the General Manager or the Commission. Any determination of the General Manager that a particular personal services contract is subject to or de hors the Commission's jurisdiction may be appealed to the Commission pursuant to Rule 5.06.

Once the Board of Supervisors has approved by resolution a determination of the Controller that work or services can be performed at a lower cost, contracts to provide such work or services are exempt from Civil Service Commission jurisdiction by Section 8.300-1 of the Charter. These contracts need not be submitted to the Commission for its review.

It remains to be determined, however, whether the certain types of contracts otherwise subject to the Civil Service Commission's jurisdiction may be deemed excepted from the operation of its civil service system.

Judicial interpretations of the Charter and state law, and prior opinions from this office have identified classes of personal services contracts which may be excepted from the request that the position be filled through the Civil Service system. Some examples of such exceptions are as follows:

1. Personal services contracts funded in whole or in part by federal or state monies or grants where the funding source requires or authorizes the city to utilize available private personnel facilities. Examples of this class of contract are as follows:

a. Contracts by Community Mental Health Services with private institutions and independent contractors under funding from the Short-Doyle Act (Sections 5600, et seq., Welfare and Institutions Code);

b. Alcohol and Drug Abuse Programs Contracts (Sections 11750, et seq., Health and Safety Code);

c. Contracts by the Mayor's Criminal Justice Council with independent contractors as the result of state or federal grants from the Law Enforcement Assistance Administration (LEAA); and

d. Contracts by the Commission on Aging with private contractors to provide new or improved programs for the elderly including nutritional services (42 U.S.C., Sections 3001, et seq.).

2. Contracts under which the contracting entity has been given the discretion to employ persons outside the classified civil service system. An example of this type of contract is given in Section 7.400 of the Charter. There the Director of Property is required to make a preliminary valuation of property to be acquired or leased by a city department. Said Section 7.400 provides that for that purpose ". . . he may employ independent appraisers." (Emphasis added.)

3. Contracts to provide immediate temporary services for a short period of time where it is impractical to certify a civil service employee or where the services are unique and specialized. Such contracts are often entered into for emergency work or to obtain a particular specialized service where there is not time to proceed through the regular civil service selection process; and

4. Contracts for temporary professional or technical consultants to departments or officers of the city and county where the contractor will not occupy a "position" in city service. (See Kennedy v. Ross, supra.)

November 14, 1980

The enumeration above of certain types of excepted contracts does not mean that they are the only excepted types of contracts. It is intended to be illustrative, not exhaustive.

Because of the variables which may be involved in future proposed personal service contracts, you should evaluate them in terms of the principles set forth in this opinion. Should you need further legal advice, do not hesitate to contact this office.

Very truly yours,

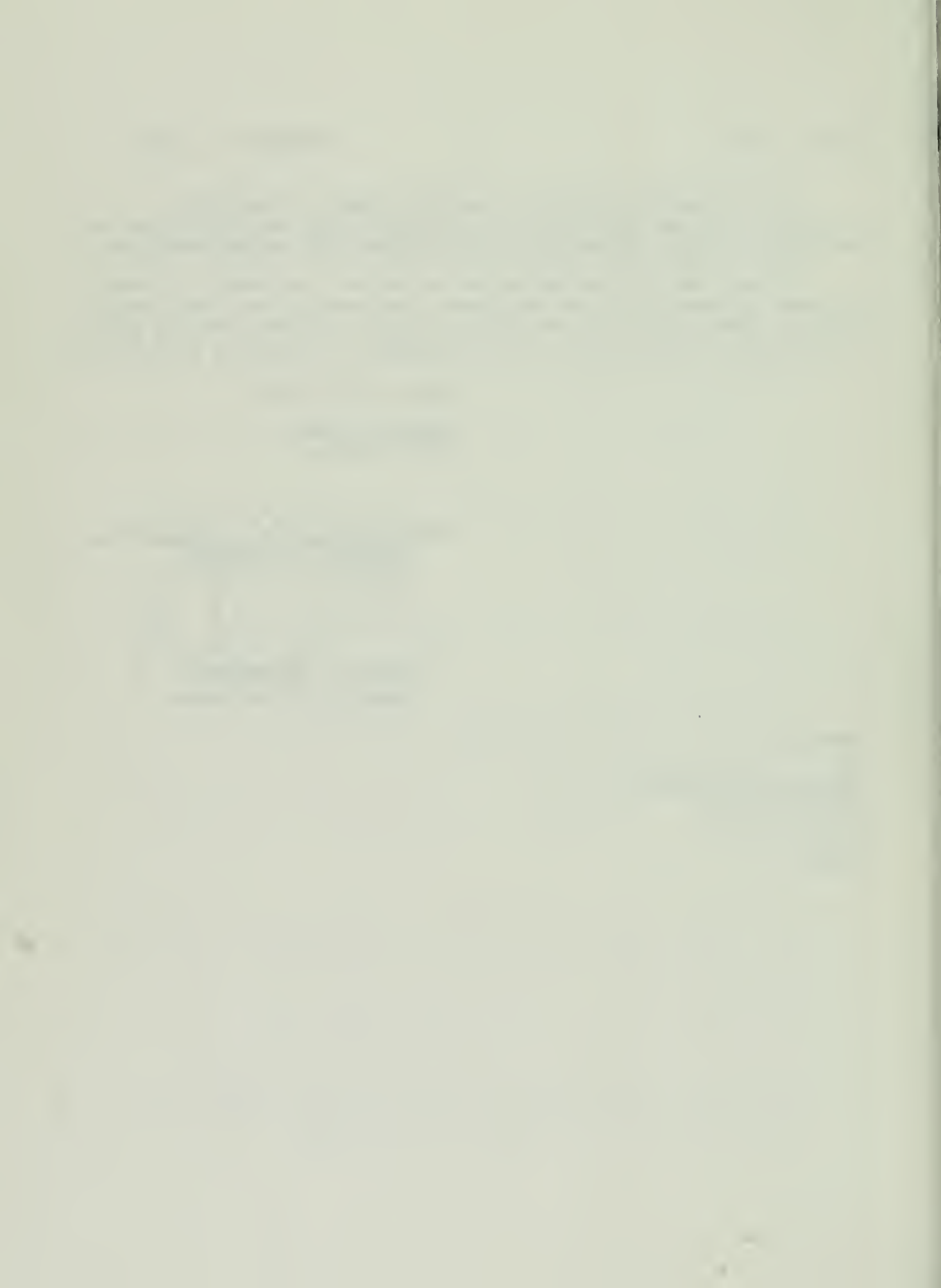
GEORGE AGNOST
City Attorney

By: Michael C. Killelea
MICHAEL C. KILLELEA
Deputy City Attorney

By: Burk E. Delventhal
BURK E. DELVENTHAL
Deputy City Attorney

APPROVED:

George Agnost
GEORGE AGNOST
City Attorney
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George Agnost,
City Attorney

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December 5, 1980

OPINION NO. 80 - 71

SUBJECT: PROPOSED RULE OF THE BOARD OF SUPERVISORS
CHANGING DATES FOR ELECTION OF PRESIDENT OF THE
BOARD AND PROVIDING THAT THE MEMBER RECEIVING
THE HIGHEST NUMBER OF VOTES SHALL BE ELECTED
PRESIDENT

REQUESTED BY: GILBERT H. BOREMAN
CLERK OF THE BOARD OF SUPERVISORS

PREPARED BY: THOMAS A. TOOMEY, JR.
CHIEF DEPUTY CITY ATTORNEY
BURK E. DELVENTHAL
DEPUTY CITY ATTORNEY

QUESTION PRESENTED

In light of San Francisco Charter Section 2.202 which prescribes the method by which, time at which, and term for which the president of the Board of Supervisors shall be elected, may the Board of Supervisors adopt a rule which provides that the supervisors constituting the new board shall, on January 8, 1981, and every second year thereafter, elect as President of the Board that member who, in the last preceding election, received the highest percentage of the popular vote to serve for a two-year term?

CONCLUSION

No.

ANALYSIS

San Francisco Charter Section 2.202 provides as follows:

The supervisors constituting the new board shall, on January 8, 1982, and every second year thereafter, elect one of their number as president of the board for a two-year term. The president shall preside at all meetings, shall appoint all standing and special committees of the board and shall have such other powers and duties as the supervisors may provide.

This provision governs the election and term of office of President of the Board of Supervisors. (City Attorney Opinion No. 80-67 dated November 10, 1980). The clear and unambiguous language of Section 2.202 provides for an election of the President of the Board on January 8th of every even-numbered year for a two year term.

The rule proposed would alter the election to every odd-numbered year providing for a two year term. It also paradoxically requires the members of the board to "elect" the member who received the highest number of votes in the last preceding election of supervisors. Both changes are in direct conflict with the present charter provision.

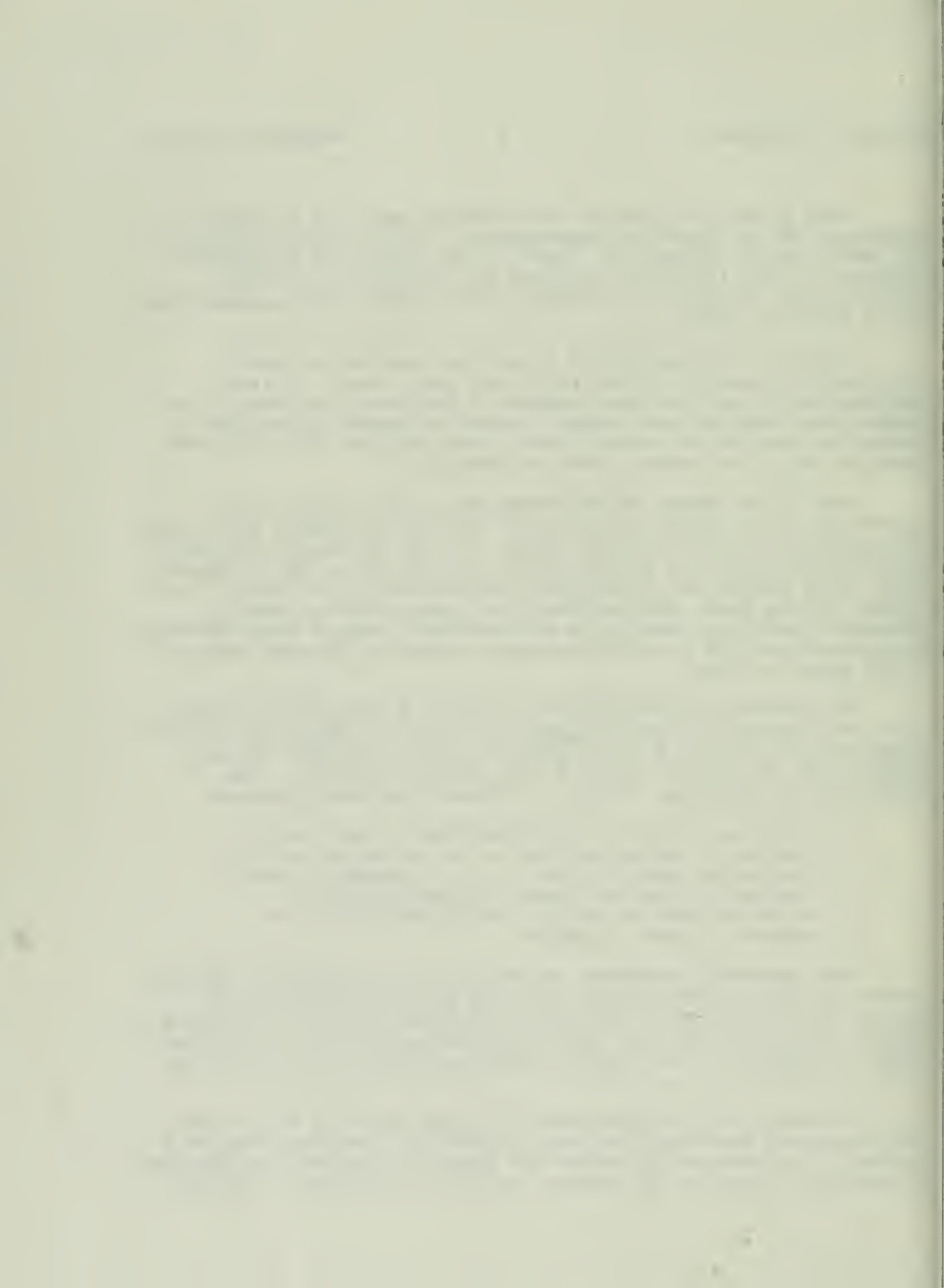
The first change would change the year in which the President of the Board is elected. The second change would strip the supervisors of the power vested in them to select any one of their number to serve as president. In its place the proposed rule would compel the supervisors automatically to "elect" that member of the Board who receives the highest vote. Such a procedure would not amount to an "election" and it would divest the supervisors of the discretionary authority Charter section 2.202 vests in them.

As presently worded Charter Section 2.202 simply states that the supervisors shall elect one of their members to serve as president of the board for a two-year term. As used in the context the word elect means a free choice election. See Wickersham v. Brittan, 93 Cal. 37 wherein the court stated:

The term "election" carries with it the idea of choice, in which all who are to be affected with the choice participate. . . . Bouvier, under the word "Election" says: Etymologically, election denotes choice, selection out of the number of those choosing.

The proposed amendment to the rule 1.5 whereby the person receiving the highest number of votes is "elected" does not amount to a free choice, is not an election within the meaning of Charter Section 2.202 and therefore conflicts with it. So too does the change in the term of office embodied in the proposed rule.

Pursuant to the Constitution of the State of California, the people of San Francisco have elected to exercise home rule powers. The document in which the home rule powers are embodied is commonly known as the Charter of 1932. Pursuant to Article



December 5, 1980

XI, Section 5 of the Constitution, San Francisco, in electing to exercise home rule powers, has acquired full control over its municipal affairs subject only to limitations or restrictions expressly set down in the Charter.

The California Supreme Court in West Coast Advertising Co. v. San Francisco (1939) 14 Cal.2d 516 held that the Charter is not a grant of power but rather a limitation on the home rule powers of the municipality. That rule has been reaffirmed many times. Simply stated the Board of Supervisors exceeds its authority when it attempts to act in contradiction to an express limitation or prohibition contained in the Charter. Redmond Theatres v. City of Modesto (1948) 8.6 CA 2d 90.

CONCLUSION

The Board of Supervisors may not by rule or otherwise adopt enactment in contravention of an express provision of the Charter. The proposed amendment to Rule 1.5 of the Board's Rules of Order is in direct conflict with Charter Section 2.202 and is therefore invalid. The changes embodied in the proposed amendment to Rule 1.5 may only be accomplished by a charter amendment.

Respectfully submitted,

GEORGE AGNOST
City Attorney

By Thomas A. Toomey, Jr.
THOMAS A. TOOMEY, JR.
Chief Deputy City Attorney

By B. E. Delventhal
BURK E. DELVENTHAL
Deputy City Attorney

Approved:

George Agnost
GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

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DEC 15 1980

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

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December 10, 1980

OPINION NO. 80-72

SUBJECT: Use of City and County's Accumulated
Contributions in the Retirement System to Pay
Costs of Implementing Proposition F (November 4,
1980 Election)

REQUESTED BY: DANIEL MATTROCCE
General Manager
City & County Employees' Retirement System

PREPARED BY: DONALD J. GARIBALDI
Deputy City Attorney

QUESTION PRESENTED

May the accumulated contributions of the City and County of San Francisco in the Retirement Fund be used to pay the costs of implementing the provisions of Charter Sections 8.559-14 and 8.585-14, which were added to the Charter by the adoption of Proposition F, at the General Election held on November 4, 1980?

CONCLUSION

No.

ANALYSIS

At the General Election held on November 4, 1980, the electorate approved Proposition F, thereby adding Sections 8.559-14 and 8.585-14 to the Charter. These new sections provide that members of the Police and Fire Departments who are members of the Retirement System under Sections 8.559 and 8.585, respectively, (hereinafter referred to as "the pre-November, 1976 plans") may elect to relinquish membership under those sections and waive all benefits provided thereby and elect to become members under Charter Sections 8.586 and 8.588, respectively, (hereinafter referred to as "the post-November, 1976 plans").

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The post-November, 1976 plans provide a program of retirement benefits which are generally lesser in amount than those provided by the pre-November, 1976 plans. Therefore, on an actuarial basis, it requires greater contributions by the City and County of San Francisco per member to fund the pre-November 1976 plans than it does to fund the post-November, 1976 plans. Accordingly, Proposition F was presented to the electorate as providing an opportunity for the City and County to reduce its liabilities under the Retirement System and thereby reduce, on an actuarial basis, the amount of the contributions required to be made to the Retirement System by the City and County.

Added Sections 8.559-14 and 8.585-14 permit current members under the pre-November, 1976 plans to waive all benefits under those plans and elect to become members under the post-November, 1976 plans. In return for waiving all benefits provided under the pre-November, 1976 plans, each person would receive a lump-sum cash payment, the total amount of which is determined pursuant to a schedule based on the person's credited service in the Retirement System as of June 30, 1980. The extent to which the City and County's liability under the Retirement System is reduced and the resultant decrease in the contributions required of the City and County will, of course, depend upon the number of persons who elect to move from the pre-November, 1976 plans to the post-November, 1976 plans. The opportunity to make this election will expire as of December 31, 1981.

In order to be fully informed with respect to this election and its consequences, each member under the pre-November, 1976 plans will require information as to the current status of his membership and its attendant benefits, the benefits available under the post-November, 1976 plans, contribution rates under the respective plans, the total amount of the lump-sum cash payment to which he will be entitled, and other specific information necessary to equip him to make an intelligent determination as to his membership under the Retirement System. The Retirement System has determined that it does not have either the number of personnel nor the expertise necessary to develop the required information and to provide consultations and counselling. Therefore, the Retirement System has concluded that it should enter into a professional services contract with a qualified individual or firm to handle these matters on its behalf. A question has arisen as to whether the City's accumulated contributions in the Retirement fund, that is, the monies which the City and County has contributed to the Retirement System, may be used to pay for this professional services contract rather than resorting to the City's General Fund.

Section 3.673 of the Charter provides:

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"The retirement fund is a trust fund to be administered by the retirement board in accordance with the provisions of this charter, solely for the benefit of the members of the system and their survivors and beneficiaries."

Sections 8.559-11 and 8.585-11, which mandate that the members under Section 8.559 and 8.585, respectively, and the City and County shall contribute to the Retirement fund for the funding of the benefits, each provide in pertinent part as follows:

". . . The city and county shall contribute to the retirement system such amounts as may be necessary, when added to the contributions [by members] referred to in the preceding paragraphs . . . to provide the benefits payable under this section. . .

Accordingly, it is clear that the monies contributed to the retirement fund by the City and County are dedicated to funding the benefits payable by the Retirement System. The monies in the Retirement Fund are expressly made trust funds to be used for that purpose, therefore, they may not be used for any other purpose unless the Charter provisions governing the Retirement System specifically authorize such use. For example, Section 3.674 specifically permits the use of the City's accumulated contributions to pay for expenses incurred in the implementation of the provisions of that Section. Section 3.674 revises the method whereby the City and County's normal contribution rate is to be determined and provides that the portion of the City and County's liability not provided by its normal contribution rate shall be amortized over a period not to exceed twenty years. Therefore, while authorizing the use of the City's contributions, Section 3.674 does not provide authority for using such monies to defray the cost of the contemplated professional services contract.

Section 8.510 of the Charter provides in pertinent part:

". . . administrative costs under the [retirement] system shall be met by contributions to the retirement system by the city and county . . . All expenses in connection with the investment of such fund or funds as may be established, including but not limited to travel and transportation costs, investment seminar expenses, postage insurance, telephone, and subscription to investment publications, shall be paid from the accumulated contributions of the city and county."

OPINION NO. 80-72

Thus, Section 8.510 imposes upon the City and County the basic requirement that in addition to making contributions to fund benefits under the Retirement System, it pay all costs involved in administering and operating the System. Section 8.510 does provide an exception to this basic requirement, in that it authorizes the use of the City's accumulated contributions to pay all expenses incurred in connection with the investment of the monies in the retirement fund of the Retirement System. The activities contemplated to be performed under the proposed professional services contract are clearly administrative in nature. "Administrative" refers to the managerial and operational activities necessary to run the Retirement System. These activities include, for example, maintenance of membership records and books of accounts, calculation of benefits, giving of information to members, and the like.

The Retirement System stands in a fiduciary relationship to its members. (See Symington v. City of Albany, 5 C.3d 23 and Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261, 1269-1270.) Therefore, it is legally obligated to provide its members with full and accurate information with respect to their benefits and rights under the System. The services contemplated under proposed contract are the ordinary administrative functions of the Retirement System -- the making of benefit calculations and providing of information as to rights and benefits. Although the City and County is hopeful that the result of the implementation of the provisions of Sections 8.559-14 and 8.585-14 will be a net reduction in the total contributions to the Retirement Fund which will be required of the City and County, these provisions do not constitute an "investment" by the City and County. "Investment", as used in Section 8.510 refers to the various activities involved in putting the monies in the retirement fund (both member contributions and City and County contributions) into various investment vehicles with a view to producing income or profits and thereby to increase the total amount of money in the retirement fund. While providing for a potential saving on the part of the City and County, the provisions of Sections 8.559-14 and 8.585-14 simply provide a procedure whereby certain members may waive the benefits of one retirement plan and become members under a different retirement plan. The activities involved in implementing this procedure are clearly "administrative" in nature, the costs of which must be borne by the City and County pursuant to the provisions of Section 8.510.

Based upon the foregoing, the accumulated contributions of the City and County in the retirement fund of the Retirement System may not be used to pay the costs of performing the activities necessary to implement the provisions of Sections 8.559-14 and 8.585-14. These costs must be borne by the City

December 10, 1980

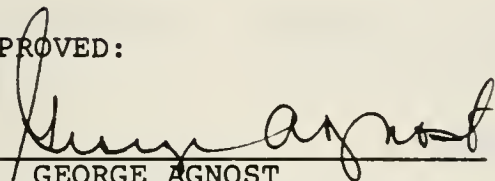
OPINION NO. 80-72
and County pursuant to its basic obligation to pay the costs of
operating the Retirement System.

Respectfully submitted,

GEORGE AGNOST
City Attorney


DONALD J. ZARIBALDI
Deputy City Attorney

APPROVED:

By 
GEORGE AGNOST
City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

December 15, 1980

OPINION NO. 80-73

DOCUMENTS DEPT.

SUBJECT: Legality of Transportation Charge
Differential based on Residence

REQUESTED BY: Quentin L. Kopp
Member, Board of Supervisors

PREPARED BY: McMorris M. Dow
Utilities General Counsel

DEC 15 1980
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QUESTION PRESENTED

May the San Francisco Municipal Railway System charge a lower fare for San Francisco residents than for non-resident users?

ANSWER

Yes.

ANALYSIS

In Opinion No. 80-69, dated November 14, 1980, it was concluded that the BART Board of Directors could establish a lower fare for residents of the BART district because of the tax support provided by the resident user. The same principle applies to the fare structure of the Municipal Railway, as between residents and non-residents.

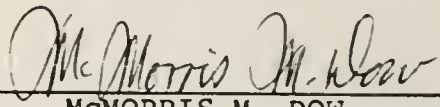
The Municipal Railway is supported with an operating subsidy derived in large part from ad valorem taxes in San Francisco, purchase and use taxes under the Bradley-Burns legislation, and by the one-half cent purchase and use tax levied in the three BART counties. A rational basis would, therefore, appear to exist for a higher charge for service to non-residents than to residents. Any proposed differential between resident and non-resident fares should be well substantiated in order to forestall charges of unjust

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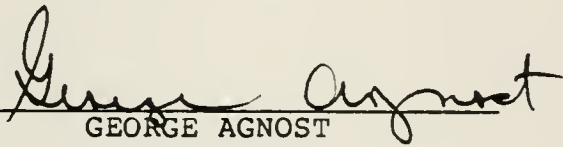
discrimination. (County of Alameda v. City and County of San Francisco (1970) 19 C.A. 3d 750, and Elliott v. Pacific Grove (1975) 54 C.A. 3d 53).

You are so advised

Very truly yours,

By 
McMORRIS M. DOW
Utilities General Counsel

Approved by:


GEORGE AGNOST
City Attorney

1817B







